

FEB 13 1984

IN THE
Supreme Court of the United States.
 October Term, 1983

L STEVENS,
CLERK

WESTERN COAL TRAFFIC LEAGUE; THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE; EDISON ELECTRIC INSTITUTE; NATIONAL COAL ASS'N; CONSUMER OWNED POWER COALITION; THE CHEMICAL MANUFACTURERS ASS'N; THE ALUMINUM ASS'N, INC.; THE FERTILIZER INSTITUTE; AMERICAN PAPER INSTITUTE; AMERICAN IRON AND STEEL INSTITUTE; COPPER DEVELOPMENT ASS'N, INC.; THE COMMITTEE ON TRANSPORTATION AND DISTRIBUTION OF THE SOCIETY OF THE PLASTICS INDUSTRY, INC.; INTERNATIONAL MINERALS & CHEMICAL CORP.; ARKANSAS-MISSOURI POWER CO.; ARKANSAS POWER & LIGHT CO.; LOUISIANA POWER & LIGHT CO.; MISSISSIPPI POWER & LIGHT CO.; NEW ORLEANS PUBLIC SERVICE, INC.; POTOMAC ELECTRIC POWER CO.; PUBLIC SERVICE COMPANY OF INDIANA, INC.; SOUTH CAROLINA PUBLIC SERVICE AUTHORITY; CENTRAL ILLINOIS LIGHT CO.; IOWA POWER & LIGHT CO.; OKLAHOMA GAS & ELECTRIC CO.; SOUTHWESTERN ELECTRIC POWER CO.; CONSUMERS POWER CO.; COMMONWEALTH EDISON CO.; MADISON GAS & ELECTRIC CO.; NEW YORK STATE ELECTRIC AND GAS CORP.; PENNSYLVANIA POWER AND LIGHT CO.; UNION ELECTRIC CO.; WISCONSIN POWER & LIGHT CO.; WISCONSIN ELECTRIC POWER CO.; WISCONSIN PUBLIC SERVICE CORP.; CAROLINA POWER & LIGHT CO.; DUKE POWER CO.; SOUTH CAROLINA ELECTRIC & GAS CO.; VIRGINIA ELECTRIC AND POWER CO.; KERR-McGEE CORP.; ELECTRIC FUELS CORP.; ALABAMA POWER CO.; GEORGIA POWER CO.; GULF POWER CO.; MISSISSIPPI POWER CO.; SOUTHERN COMPANY SERVICES, INC.; GULF STATES UTILITIES CO.; NORTH DAKOTA PUBLIC SERVICE COMMISSION; NORTH DAKOTA STATE WHEAT COMMISSION; CHAMBER OF COMMERCE OF FARGO, NORTH DAKOTA; COASTAL STATES ENERGY CO.,

Petitioners,

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; ASSOCIATION OF AMERICAN RAILROADS; ATCHISON, TOPEKA AND SANTA FE RY. CO.; BURLINGTON NORTHERN R.R. CO.; CHESSIE SYSTEM; CHICAGO AND NORTH WESTERN TRANSPORTATION CO.; CONSOLIDATED RAILROAD COMPANY; DENVER AND RIO GRANDE WESTERN R.R. CO.; ILLINOIS CENTRAL GULF R.R. CO.; MISSOURI PACIFIC R.R. CO.; NORFOLK AND WESTERN RY. CO.; SEABOARD COAST LINE R.R. CO.; SOO LINE R.R. CO.; SOUTHERN PACIFIC TRANSPORTATION CO.; SOUTHERN RY. CO.; UNION PACIFIC R.R. CO.,

Respondents.

On Petition for Writ of Certiorari to the
 United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Dated: February 13, 1984

[Attorneys for Petitioners listed on inside cover]

WILLIAM L. SLOVER
*C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LeSEUR
1224 17th Street, N.W.
Washington, D.C. 20036
(202) 347-7170

J. RAYMOND CLARK
MARY TODD FOLDES
1225 19th Street, N.W.
Washington, D.C. 20036
(202) 659-0770

JOHN F. DONELAN
JOHN M. CLEARY
FREDERIC L. WOOD
NICHOLAS J. DiMICHAEL
914 Washington Building
Washington, D.C. 20005
(202) 783-1215

JOHN GUANDOLO
A.T. UDRYS
Room 200
1090 Vermont Avenue, N.W.
Washington, D.C. 20005
(202) 783-8131

HARRY H. VOIGT
LEONARD M. TROSTEN
MICHAEL F. McBRIDE
DANIEL J. CONWAY
Suite 1100
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 457-7500

DENNIS N. BARNES
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5125

DICKSON R. LOOS
BARRY ROBERTS
600 Maryland Avenue, S.W.
Washington, D.C. 20006
(202) 484-9090

*Counsel of Record for Petitioners

EDMUND E. HARVEY
1101 Vermont Avenue, N.W.
Washington, D.C. 20005
(202) 289-3000

HAROLD E. SPENCER
RICHARD S.M. EMRICH
20 North Wacker Drive
Chicago, IL 60606
(312) 236-0204

JOHN MOLM
ROBERT P. EDWARDS, JR.
Suite 1400 Candler Bldg.
127 Peachtree Street, N.W.
Atlanta, GA 30303
(404) 658-8000

HERBERT J. MARTIN
FREDERICK W. CLAYBROOK, JR.
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-5959

MARTIN W. BERCOVICI
LAWRENCE P. HALPRIN
1150 17th Street, N.W.
Washington, D.C. 20036
(202) 457-1100

DAVID A. SUTHERLUND
1120 G Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 628-2788

CHARLES J. McCARTHY
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 393-5710

JOHN OBERDORFER
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

DANIEL S. KUNTZ
Capitol Building
Bismarck, N.D. 58505
(701) 224-2400

Attorneys for Petitioners

QUESTIONS PRESENTED

In order to secure the jurisdiction of the Interstate Commerce Commission over any complaint that a rail transportation rate is unreasonably high under the Interstate Commerce Act, a shipper must prove that the rail carrier has "market dominance," that is, that there is no "effective competition" for the transportation in issue. 49 U.S.C. §10709(a).

When the Interstate Commerce Commission considered the meaning of "market dominance" shortly after enactment of this provision, it ruled that the statutory language limited the inquiry to whether the shipper had competitive transportation alternatives for transporting that product from the origin to the destination. The Commission expressly rejected, as contrary to the statutory language, consideration of alternative products ("product competition") and alternative origins and destinations ("geographic competition").

After Congress, in the Staggers Act, reaffirmed the market dominance standard as so interpreted, the Commission in 1981 reversed its 1976 interpretation and held that it would consider product and geographic competition in adjudicating the issue of market dominance. That 1981 decision significantly limits the I.C.C.'s jurisdiction by restricting shipper access to the agency in all cases involving the fundamental issue of whether a rate exceeds a reasonable maximum. The United States Court of Appeals for the Fifth Circuit in a divided, *en banc* decision (overturning a decision by a panel of the Fifth Circuit) deferred to the Commission's new statutory interpretation.

The first question presented is whether the Interstate Commerce Commission has erroneously limited its jurisdiction by interpreting the threshold "market dominance" standard so as to improperly preclude shippers from exercising their statutory right to challenge the reasonableness of a rail rate under the Interstate Commerce Act.

The second question presented is whether the court of appeals, through its uncritical deference to the Commission's reversal of its contemporaneous statutory interpretation, abdicated its duty as a reviewing court to interpret and enforce the laws of the United States.

Rule 21.1(b) Statement

The parties to the proceeding in the U.S. Court of Appeals for the Fifth Circuit are listed below:

Western Coal Traffic League
Arkansas-Missouri Power Company
Arkansas Power and Light Company
Louisiana Power and Light Company
Mississippi Power and Light Company
New Orleans Public Service, Inc.
Potomac Electric Power Company
Public Service Company of Indiana, Inc.
South Carolina Public Service Authority
Central Illinois Light Company
Gulf States Utilities Company
Iowa Power and Light Company
Kerr-McGee Corporation
Oklahoma Gas & Electric Company
Southwestern Electric Power Company
The Aluminum Association, Inc.
Consumers Power Company
Commonwealth Edison Company
Madison Gas and Electric Company
New York State Electric and Gas Corp.
Pennsylvania Power & Light Co.
Union Electric Company
Wisconsin Electric Power Company
Wisconsin Power & Light Company
Wisconsin Public Service Corporation
Edison Electric Institute
American Paper Institute, Inc.
The National Industrial Transportation League

Carolina Power & Light Company
Duke Power Company
South Carolina Electric & Gas Company
Virginia Electric and Power Company
Consumer Owned Power Coalition
Copper Development Association, Inc.
Nebraska Public Power District
International Minerals & Chemical Corp.
The Fertilizer Institute
National Coal Association
The Chemical Manufacturers Association
The Chlorine Institute
North Dakota Public Service Commission
North Dakota State Wheat Commission
Chamber of Commerce of Fargo, N.D.
The Committee on Transportation and Distribution
of the Society of the Plastics Industry, Inc.
Electric Fuels Corporation
American Iron and Steel Institute
Coastal States Energy Company
Kellogg Company
National Association of Manufacturers
Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Southern Company Services, Inc.
Interstate Commerce Commission
United States of America
Association of American Railroads
Atchison, Topeka and Santa Fe Railway Company
Burlington Northern Railroad Company
Bessemer and Lake Erie Railroad Company
Chessie System
Chicago and North Western Transportation Company
Consolidated Railroad Company
Denver and Rio Grande Western Railroad Company
Illinois Central Gulf Railroad Company

Missouri Pacific Railroad Company
Norfolk and Western Railway Company
Seaboard Coast Line Railroad
Soo Line Railroad Company
Southern Pacific Transportation Company
Southern Railway Company
Union Pacific Railroad

Rule 28.1 Statement

The following statement is made in compliance with the Court's Rule 28.1.

Petitioner Arkansas Power & Light Company has as its parent Middle South Utilities, Inc. and is affiliated with Louisiana Power & Light Company, Missouri Power & Light Company, and New Orleans Public Service, Inc.

Petitioners Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Company Services, Inc. are all subsidiaries of the Southern Company. Southern Electric Generating Company is a subsidiary of Petitioners Alabama Power Company and Georgia Power Company.

Petitioner Electric Fuels Corporation has as its parent Florida Progress Corporation and is affiliated with Florida Power Corporation, Talquin Corporation, Progress Financial Services, Inc., Progress Equities, Inc. and Southeastern Computer Corporation.

Petitioner Pennsylvania Power & Light Company has as a non-wholly owned subsidiary the Safe Harbor Water Power Company. Petitioner Union Electric Company has a non-wholly owned subsidiary Electric Energy, Inc. Petitioner Wisconsin Power & Light Company has as non-wholly owned subsidiaries Wisconsin River Power Company and Windworks, Inc. Petitioner Wisconsin Public Service Corp. has as non-wholly owned subsidiaries Wisconsin River Power Company and Wisconsin Valley Improvement Company.

Petitioner International Minerals & Chemical Corp. has as subsidiaries and affiliates: Chinhae Chemical Co., Coromandel Fertilizer, Ltd., Gans Transport B.V., Campagne Senegaloise Des Phosphates de TIBA, Sotave Amazonia Quimica E. Minerals S.A., Louisville Fertilizer & Gin Co., and Peoples Fertilizer Co.

Petitioner Carolina Power & Light Company has two subsidiaries that are not wholly owned: Leslie Coal Mining Company and McInnes Coal Mining Company.

Petitioner Duke Power Company has one subsidiary that is not wholly owned (Martin County Coal Company).

Petitioner Virginia Electric and Power Company has as its parent Dominion Resources Inc.

Petitioner Iowa Power and Light Company has as its parent Iowa Resources Inc. and is affiliated with Redlands, Inc., Enercor, Inc., Industries of Iowa Corp., Enserco, Inc., Middlewood Inc., Unitrain Inc., Iowa Computer Resources Inc., and Westcon Inc.

Petitioner Southwestern Electric Power Company has as its parent Central and South West Corp., and is affiliated with Public Service Company of Oklahoma, West Texas Utilities Co., Central Power & Light Company, Central and South West Fuels, Inc., and Central and South West Services, Inc.

Petitioner Kerr-McGee Corporation has as non-wholly owned subsidiaries Kerr-McGee Oil (U.K.), Limited, White Shoal Pipeline Corporation, and Downtown Airpark Inc.

Of the remaining Petitioners, some are trade associations which are either unincorporated or are membership corporations, while the remainder have no parents, subsidiaries (except wholly owned subsidiaries) or affiliates.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED	i
Rule 21.1(b) Statement	ii
Rule 28.1 Statement	iv
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. THIS CASE INVOLVES ISSUES OF EXTRA- ORDINARY PUBLIC IMPORTANCE	9
II. THE ICC AND THE COURT OF APPEALS IGNORED THE INTENT OF CONGRESS IN INTERPRETING THE STATUTE	12
A. The Statutory Construction Adopted by the I.C.C. and the Court of Appeals Violates the Plain Meaning and Congressional Intent	12
B. The Court of Appeals Abdicated Its Duty to Interpret the Statute	16
1. Role of the Courts in Statutory Construction	16
2. The ICC's Contemporaneous Construction of the Statute Was Ignored by the Court of Appeals	17
CONCLUSION	20

TABLE OF AUTHORITIES

Cases:	<u>Page</u>
<i>American Tobacco Co. v. Patterson,</i> 456 U.S. 63 (1982)	14
<i>Association of American Railroads v. ICC,</i> 564 F.2d 486 (1977)	16
<i>Atchison, Topeka & Santa Fe Ry. v. ICC,</i> 580 F.2d 623 (D.C. Cir. 1978)	5
<i>Ayrshire Collieries Corp. v. United States,</i> 335 U.S. 573 (1948)	9
<i>Bob Jones University v. United States,</i> 103 S. Ct. 2017 (1983)	16
<i>Brown Shoe Co., Inc. v. United States,</i> 370 U.S. 244 (1962)	15
<i>Bureau of Alcohol, Tobacco and Firearms v. FLRA,</i> 104 S. Ct. 439 (1983)	17
<i>Burlington Northern, Inc. v. United States,</i> 661 F.2d 964 (D.C. Cir. 1981)	9
<i>Celanese Chemical Co. v. United States,</i> 632 F.2d 568 (5th Cir. 1981)	9
<i>Central Power & Light Co. v. United States,</i> 634 F.2d 137 (5th Cir. 1980), <i>on rehearing</i> , 639 F.2d 1104 (1981), <i>cert. denied</i> , 454 U.S. 831 (1981)	6
<i>Chemehuevi Tribe of Indians v. FPC,</i> 420 U.S. 395 (1975)	18
<i>Cleveland-Cliffs Iron Co. v. ICC,</i> 664 F.2d 568 (6th Cir. 1981)	9
<i>Consumers Power Co. v. Norfolk and Western Ry. Co.,</i> I.C.C. Docket No. 37857, July 1, 1983	9

	<u>Page</u>
<i>Federal Election Commission v. Democratic Senatorial Campaign Committee,</i> 454 U.S. 27 (1981)	16
<i>Ford Motor Co. v. ICC,</i> 714 F.2d 1157 (D.C. Cir. 1983)	11
<i>FTC v. Proctor & Gamble Co.,</i> 306 U.S. 568 (1967)	15
<i>Howe v. Smith,</i> 452 U.S. 473 (1981)	14
<i>Incentive Rates on Coal - Axial CO to Coleto Creek, TX,</i> 362 I.C.C. 572 (1980)	6
<i>Interstate Natural Gas Association v. FERC,</i> 716 F.2d 1 (D.C. Cir. 1983)	16
<i>Iowa Public Service Co. v. ICC,</i> 643 F.2d 542 (8th Cir. 1981)	9
<i>Local 777, Democratic Union Organizing Committee v. NLRB,</i> 603 F.2d 862 (D.C. Cir. 1978)	18
<i>Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.,</i> 103 S. Ct. 2856 (1982)	19
<i>Power Reactor Development Co. v. International Union of Elec.,</i> 367 U.S. 396 (1961)	17
<i>Southern Class Rate Investigation,</i> 100 I.C.C. 513 (1925)	9
<i>Southern Ry. v. Seaboard Allied Milling Corp.,</i> 442 U.S. 444 (1979)	15

	Page
<i>Teamsters v. Daniel,</i> 439 U.S. 551 (1979)	14
<i>Texas and P. Ry. Co. v. Abilene Cotton Oil Co.,</i> 204 U.S. 426 (1907)	10
<i>Udall v. Tallman,</i> 380 U.S. 1 (1965)	17
<i>Union Pacific R.R. v. United States,</i> 637 F.2d 764 (10th Cir. 1981)	9
<i>United States v. American Trucking Associations,</i> 310 U.S. 534 (1940)	18
<i>United States v. Connecticut National Bank,</i> 418 U.S. 656 (1974)	15
<i>United States v. Falstaff Brewing Corp.,</i> 410 U.S. 526 (1973)	15
<i>United States v. General Dynamics Corp.,</i> 415 U.S. 486 (1974)	15
<i>United States v. Grinnell Corp.,</i> 384 U.S. 563 (1966)	15
<i>United States v. Marine Bancorporation,</i> 418 U.S. 602 (1974)	15
<i>United States v. Sheffield Bd. of Commissioners,</i> 435 U.S. 110 (1978)	16
<i>Zuber v. Allen,</i> 396 U.S. 168 (1969)	17
Statutes:	
28 U.S.C. §1254(1)	2
§2321	2, 7
§2341-§2350	2, 7

Page**Interstate Commerce Act**

49 U.S.C.	§1(5)(c)	2
	§10701a(b)	10
	§10709(a)	3, 13
	§10709(b)	11
	§10709(d)	5

Pub. L. No. 94-210, §202, 90 Stat. 31 (1976)	2, 3, 11, 13
---	---------------------

Pub. L. No. 95-473, §3(a), 92 Stat. 1337 (1978)	3
--	----------

Pub. L. No. 96-448, 94 Stat. 1895 (1980)	5
---	----------

Regulations:

45 Fed. Reg. 3353 (Jan. 17, 1980)	7, 19
--	--------------

45 Fed. Reg. 83302 (Dec. 16, 1980)	7
---	----------

45 Fed. Reg. 83342 (Dec. 16, 1980)	7
---	----------

Legislative History:

S. Rep. No. 94-499, 94th Cong., 2d Sess. (1976)	12, 15
--	---------------

H.R. Rep. No. 95-1395, 95th Cong., 2d Sess. (1978)	3
---	----------

H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. (1980)	5
---	----------

H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. (1980)	5, 16
---	--------------

126 Cong. Rec. 19398-19413 (1980)	5
--	----------

126 Cong. Rec. H8612 (daily ed. Sept. 9, 1980)	5
---	----------

Committee Print 96-1FC, 96th Cong., 2d Sess. (1980)	6
--	----------

	<u>Page</u>
Other:	
Federal Rules of Appellate Procedure, Rule 35(a)(2)	8
Kearney, Management Consultants, A Study to Perform an In-Depth Analysis of Market Dominance and Its Relationship to Other Provisions of the 4-R Act, April 10, 1979	19
Market Dominance in the Staggers Act, 48 I.C.C. Prac. J. 662 (1981)	16

IN THE
Supreme Court of the United States
October Term, 1983

WESTERN COAL TRAFFIC LEAGUE, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to
the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners represent thousands of industries, businesses and public utilities dependent upon the Interstate Commerce Commission ("Commission" or "ICC") to protect them and the public they serve from rail carrier pricing abuses. Certiorari is requested for review of a decision of the United States Court of Appeals for the Fifth Circuit. That decision affirmed an ICC decision to limit its jurisdiction, and therefore to restrict shipper access to the right under the Interstate Commerce Act to seek relief from unreasonable rates. The questions presented in this petition are therefore of extraordinary importance.

OPINIONS BELOW

The opinion of the *en banc* court of appeals, *Western Coal Traffic League v. United States*, 719 F.2d 772 (5th Cir. 1983) [*WCTL II*], appears as Appendix A in the accompanying volume. The panel opinion, reported at 694 F.2d 378 (5th Cir. 1982) [*WCTL I*], set aside in part by the *en banc* court, appears as Appendix C. In its *en banc* decision, the court of appeals affirmed a 1981 decision by the ICC, Ex Parte No. 320 (Sub-No. 2), *Market Dominance Determinations and Consideration of Product Competition*, 365 I.C.C. 118 (1981) [Ex Parte No. 320 (Sub-No. 2)], which reinterpreted the statutory term "market dominance." This 1981 ICC decision overturned a contrary ruling issued in 1976, denominated Ex Parte 320, *Special Procedures for Making Findings of Market Dominance* [Ex Parte No. 320], 353 I.C.C. 875 and 355 I.C.C. 12 (1976). The ICC's 1981 and pertinent parts of its 1976 rulings are set forth in Appendices D through F, H, and I.

JURISDICTION

The jurisdiction of the Court to review the decision of the court of appeals is invoked under 28 U.S.C. §1254(1). The jurisdiction of the court of appeals was properly invoked under 28 U.S.C. §2321 and §§2341-2350. The judgment of the court of appeals on rehearing *en banc* was entered on November 14, 1983 (App. G.).

STATUTORY PROVISIONS

Section 202 of the Railroad Revitalization and Regulatory Reform Act of 1976 [4-R Act]¹ added a new Section 1(5)(c) to the Interstate Commerce Act, 49 U.S.C. §1(5)(c). The 4-R Act provision established the "market dominance" jurisdictional threshold, and the new Section 1(5)(c) defined it as follows:

'market dominance' refers to an absence of effective competition from other carriers or modes of trans-

¹Pub. L. No. 94-210, §202, 90 Stat. 31, 34-39 (1976).

portation, for the traffic or movement to which a rate applies. . .

In 1978, Congress codified the Interstate Commerce Act for purposes of technical clarity and consistency.² The codified version of Section 1(5)(c) appears at 49 U.S.C. § 10709(a):

In this section, "market dominance" means an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies.

The provisions of these and related statutes are set forth in the statutory appendix in the accompanying volume.

STATEMENT OF THE CASE

In 1976, Congress defined the ICC's jurisdiction to adjudicate the maximum reasonableness of rail freight rates to encompass only those situations where the involved rail carrier or carriers possessed "market dominance." Market dominance was defined in the statute as "an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies. . ." 4-R Act, §202(b). (App. SA-6) Congress required the ICC to establish "standards and procedures" that would "provide for a practical determination [of market dominance] without administrative delay." *Id.*

In response to the Congressional directive, the Commission in 1976 instituted a rulemaking proceeding denominated *Ex Parte No. 320*. A critical issue in that proceeding was the proper definition of the relevant market under the statute for purposes of determining market dominance. After an exhaustive examination, the Commission concluded that the relevant market was the market for transportation services of the same product

²No substantive change was intended. Pub. L. 95-473, §3(a), 92 Stat. 1337, 1466 (1978); H.R. Rep. No. 95-1395, 95th Cong., 2d Sess. 4-5 (1978).

between the same origin and destination as that identified in the challenged tariff. *Ex Parte No. 320*, 353 I.C.C. at 900-909 (App. H-4 to H-15). For example, if a shipper challenged a rail rate for the movement of magnesium ingots from Washington to Tennessee, the issue would be whether the shipper had practical competitive transportation alternatives for that product between those two points. The Commission would examine whether other rail carriers or other modes of carriage such as truck or water transport could carry the ingots from Washington to Tennessee in competition with the rail carrier whose rate was at issue.

In the rulemaking proceeding (and later before the reviewing court), the railroad industry argued that the relevant market should include all potentially interchangeable products ("product competition") and all alternative origin/destination pairs ("geographic competition"). In the example involving the reasonableness of rates for the movement of magnesium ingots from Washington to Tennessee for use in aluminum production, the railroads would have defined the market broadly to encompass any product that could potentially be substituted for magnesium in manufacturing aluminum (or perhaps some other metal), as well as all potential geographic points from which the same or substitute products might be obtained.

The Commission unanimously rejected the railroads' request that it consider product and geographic competition in making market dominance determinations for two reasons. First, it declared that the statute was "explicit" in precluding the agency from considering product and geographic competition. *Ex Parte No. 320*, 353 I.C.C. at 905 (App. H-10). The Commission stated that:

[t]here is no language in the legislation which would warrant the extension of the phrase "the traffic or movement to which the rate applies" beyond transportation services which are comparable to that described in the issue tariff.

Second, it concluded that it would be administratively impossible to make reasoned decisions involving complex product and geographic competition issues without creating the "regulatory delay" Congress expressly sought to avoid. *Id.* at 905-906 (App. H-10 to H-12). The ICC's rejection of product and geographic competition was subsequently upheld by the United States Court of Appeals for the D.C. Circuit. *Atchison, Topeka & Santa Fe Ry. v. I.C.C.*, 580 F.2d 623, 633-34 (D.C. Cir. 1978) [ATSF].

After the D.C. Circuit's affirmance of *Ex Parte No. 320*, legislation was introduced that would have amended the 4-R Act definition of market dominance to require that the ICC consider product and geographic competition.³ This attempt to change the market dominance definition during consideration of the next major rail legislation was rejected.⁴ Instead, Congress, in the Staggers Rail Act of 1980,⁵ expressly retained the 4-R Act definition of market dominance. The Conference Report declared that "[t]he definition of market dominance under existing law has not been altered by the Conference substitute and it is not intended that there be any change in the meaning of the term. . ." H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 88 (1980) [Conference Report].

³H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 4-5, 55-56 (1980) [House Report].

⁴126 Cong. Rec. 19398-19413 (1980). The proposed Title II to H.R. 7235, which had been approved by the Committee, was rejected in favor of a substitute on the floor of the House in part because the House Committee bill required the use of product and geographic competition. See, e.g., 126 Cong. Rec. 19402-403 (1980). The version finally adopted by the full House made no change in the 4-R Act definition as codified in Section 10709(a). 126 Cong. Rec. H8612-13 (daily ed. Sept. 9, 1980).

⁵Pub. L. No. 96-448, 94 Stat. 1895 (1980) [Staggers Act]. In Section 202 of the Staggers Act, Congress amended the existing law by adding a provision (now codified as 49 U.S.C. §10709(d)) which precludes the ICC from making a market dominance finding if an assailed rate is below a specified revenue-to-variable cost percentage.

At the same time Congress was debating whether to amend the 4-R Act market dominance definition to include consideration of product and geographic competition, the ICC attempted to accomplish the same result through administrative action. In January of 1980, the Commission relied upon product and geographic competition to make a no-market-dominance finding in a major coal rate proceeding. *Incentive Rates on Coal - Axial, CO to Coleto Creek, TX*, 362 I.C.C. 572 (1980) [*Coleto Creek*]. Less than one month later, the House subcommittee possessing oversight authority over the ICC issued a comprehensive report criticizing *Coleto Creek*.⁶ Describing *Coleto Creek* not only as an "unlawful" decision but also one which, if not overturned, would have "consequences [that] will be widespread and could seriously threaten the Nation's economic well-being," Oversight Report at 89, the subcommittee found that "in considering product and geographic competition, the agency . . . violates the 4-R Act and its own regulations and decisions." *Id.* at 84. The subcommittee directed that "[i]n determining the presence or absence of effective competition, the agency should consider only providers of transportation services between the designated origin and destination." *Id.* at iv. Later, *Coleto Creek* was set aside by a court of appeals on numerous grounds, including the Commission's abandonment of its earlier interpretation of the statutory definition of market dominance. *Central Power & Light Co. v. United States*, 634 F.2d 137 (5th Cir. 1980), *on rehearing*, 639 F.2d 1104, *cert. denied*, 454 U.S. 831 (1981). Soon after, Congress rejected the railroads' attempt to change the 4-R Act definition that had been contemporaneously interpreted by the ICC to exclude product and geographic competition.

Despite these events, the ICC instituted a proceeding shortly after the enactment of the Staggers Act in which the agency proposed to "continue" to consider product and geographic com-

⁶Comm. Print 96-IFC, 96th Cong., 2d Sess. (1980) [Oversight Report].

petition in making market dominance determinations. This proceeding was denominated as Ex Parte No. 320 (Sub-No. 2), the proceeding under consideration here.⁷ After receiving public comments, the ICC issued a decision declaring that it would consider product and geographic competition in making market dominance findings because: (1) the action was required by the Staggers Act; and, (2) the change was justified by the agency's experience since 1976 in implementing the market dominance provision. *Ex Parte No. 320 (Sub-No. 2)*, 365 I.C.C. at 127-131 (App. D-13 to D-19).

In the review proceedings instituted by Petitioners under 28 U.S.C. §§2321 and 2341-2350, a divided panel of the court of appeals set aside the ICC's decision to consider product and geographic competition. *WCTL I*, 694 F.2d at 389-391 (App. C-18 to C-23). The panel majority concluded that the ICC's statutory interpretation was contrary to the text, legislative history and Congressional intent underlying the market dominance test. *Id.* The panel further observed that there was not "one iota" of evidence in the record to support the ICC's conclusion that "experience" justified a change in construction. *Id.* at 391 (App. C-23).

The panel's decision was set aside by the court upon rehearing *en banc*. The divided *en banc* court felt compelled to defer to the ICC's new construction of market dominance, even if "the members of this Court might have construed the statute differently. . . ." because the result, in the court's view, represented a permissible policy decision by the ICC. *WCTL II*, 719 F.2d at 777-780 (App. A-7 to A-12).

⁷See, 45 Fed. Reg. 83342 (December 18, 1980). This proceeding superseded another rulemaking proceeding concerning market dominance which the ICC had instituted at the time it issued *Coleto Creek*. See *Ex Parte No. 320 (Sub-No. 1)*, *Rail Market Dominance and Related Considerations*, 45 Fed. Reg. 3353 (Jan. 17, 1980), discontinued, 45 Fed. Reg. 83302 (Dec. 18, 1980). This latter proceeding was discontinued in view of the intervening passage of the Staggers Act.

The dissenting members on the *en banc* court⁸ maintained that the majority's decision to defer to the ICC's statutory construction constituted an "abdication of our duty to interpret the laws of the United States." The dissent analyzed in detail the statutory language, the clarity of which, they noted, had expressly led to the Commission's original interpretation of the market dominance provision as "explicit" in precluding consideration of product and geographic competition. Unlike the majority, the dissent examined the legislative history of the 4-R Act, and found no support for the Commission's new interpretation. Finally, the dissent noted that the Commission itself had forsaken any reliance on the Staggers Act to support the change. Indeed, the dissent noted that the existence of Section 205 of the Staggers Act (App. SA-10 to SA-12) demonstrated that Congress knew the economic significance of product and geographic competition and specifically referred to those factors when it thought them appropriate, but declined to make any change in the market dominance definition. Quoting this Court, the dissent declared that "courts are the final authorities on the issue of statutory construction" and must reject administrative constructions of the statute that are inconsistent with the Congressional mandate. *WCTL II*, 719 F.2d at 780-784 (App. A-14 to A-22).

REASONS FOR GRANTING THE WRIT

This case presents questions of extraordinary importance to our economy. The ICC's erroneous limitation on its jurisdiction goes to the very heart of the right to petition for relief from unreasonable railroad transportation rates. The decision of the *en banc* court — which granted such review because of the extraordinary importance of the case⁹ — also has major significance because it affects the adjudication of all pending cases

⁸Circuit Judges Alvin B. Rubin and Thomas M. Reavely formed the majority on the panel, and dissented from the *en banc* decision.

⁹Federal Rule of Appellate Procedure 35(a)(2).

at the Commission involving maximum rate reasonableness, and all those that will be presented to the agency in the future. Moreover, because the issues involved in this case concern a rule of general applicability, the general decision to consider product and geographic competition cannot be tested in individual proceedings before the Commission.

The Commission decision is the product of a seriously flawed statutory analysis. Indeed, the Commission itself had rejected that very analysis just five years earlier, at the time that the statute was enacted. The *en banc* majority, instead of undertaking an independent review of the statute, deferred to the Commission's new-found and non-contemporaneous interpretation. In doing so, the *en banc* majority permitted the ICC to ignore the statutory language, disregard the legislative history, and flout the Congressional policy.

I. THIS CASE INVOLVES ISSUES OF EXTRA-ORDINARY PUBLIC IMPORTANCE

The Interstate Commerce Act imposes upon the Commission the duty to protect rail shippers from unreasonably high rate levels. This duty has lain at the very heart of the ICC's Congressional mandate since the agency's birth in 1887. *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573, 592 (1948); *Southern Class Rate Investigation*, 100 I.C.C. 513, 603 (1925). The Commission's historic duty to protect rail shippers from the imposition of unlawfully high freight rates was most recently reaffirmed by Congress in the 4-R Act and the Staggers Act. Both of these laws call upon the ICC to prohibit carrier rate exploitation of shippers in those instances where carriers possess "market dominance."¹⁰

¹⁰See, e.g., *Burlington Northern, Inc. v. United States*, 661 F.2d 964, 973 (D.C. Cir. 1981); *Cleveland-Cliffs Iron Co. v. ICC*, 664 F.2d 568, 588 (6th Cir. 1981); *Iowa Public Service Co. v. ICC*, 643 F.2d 542, 544 (8th Cir. 1981); *Union Pacific R.R. v. United States*, 637 F.2d 764, 767 (10th Cir. 1981); *Celanese Chemical Co. v. United States*, 632 F.2d 568, 577 (5th Cir. 1981).

Despite the fact that protection of captive rail shippers from rail carrier pricing abuses remains a central function of the agency, the effect of the ICC's decision on product and geographic competition is to greatly restrict access to statutory protection by administrative fiat. As observed by the court of appeals: "[W]hen such evidence is considered, the number of rates immunized from regulation is increased." *WCTL I*, 694 F.2d at 382 (App. C-2); *WCTL II*, 719 F.2d at 778 n.10 (App. A-8). No other act by the ICC can have as devastating an impact on a rail shipper's right to a fair transportation charge as a finding that the agency is without jurisdiction to hear the shipper's case. The only forum that shippers have available to them to question the reasonableness of rail freight rates is the ICC. *Texas and P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 435-42, 447-48 (1907). If access to the Commission is foreclosed, the shipper has no alternative but to pay a rail carrier's rate, however high that rate may be. An agency decision that strips shippers and receivers of their right to present their claims of unreasonableness to the agency is clearly of such significant scope and magnitude as to warrant review by this Court.¹¹

The extreme breadth of the ICC's new interpretation of the statute allows it to avoid reviewing rail rates in precisely those markets where Congress intended regulation to continue. The effect of the Commission's administrative redefinition of the jurisdictional test is to "foreclos[e] shippers from finding an avenue to complain of the level of rates they are assessed as claimed captive shippers," and to "end the usefulness of this Commission to the body of rail shippers." ICC Docket No. 37857, *Consumers Power Co. v. Norfolk and Western Ry. Co.* (Initial Decision served July 1, 1983), slip op. at 4.

¹¹Petitioners seek only to preserve the opportunity to be heard by the Commission. Once jurisdiction attaches, the agency is of course free to determine if in fact the challenged rail rate exceeds a reasonable maximum under 49 U.S.C. § 10701a(b) (App. SA-12).

Apart from the fact that the ICC's redefinition of market dominance will eliminate jurisdiction in situations where Congress intended it to apply, the amorphous new standard entails monumental expense, effort and delay in defining the relevant product and geographic markets and addressing the existence of actual or potential competition in all such markets. It thus promotes the very type of regulatory lag which Congress sought to avoid when it ordered the ICC to adopt market dominance standards and procedures that were to "provide for a practical determination without administrative delay." 4-R Act §202(b) (App. SA-6).¹² The ICC's new definition totally defeats this statutory command.

The Commission's Ex Parte No. 320 (Sub-No. 2) decision to narrow severely its jurisdiction is clearly "indicative of an agency overeager to relinquish control." *Ford Motor Co. v. ICC*, 714 F.2d 1157, 1158 (D.C. Cir. 1983). Certiorari is required in order to protect the public interest which the ICC has abandoned, and to reinstate the integrity of the administrative process, which the ICC has forsaken.

¹²This is forcefully demonstrated by the experience with rail rate cases which have been filed since passage of the Staggers Act that have been subjected to the new jurisdictional test. Because of the complexity of the antitrust-type issues and the sheer volume of the evidentiary records which must be compiled to address these issues, the Commission instituted a procedure for bifurcating rate cases filed between October 1, 1980 and March 30, 1981 under Section 229 of the Staggers Act, 94 Stat. 1934, set out in a note following 49 U.S.C. §10701a. Under this procedure, the first inquiry is limited to the market dominance issues and the second deals with the merits of rate reasonableness. Long delays involving market dominance have been the rule. Even of those cases that have been litigated, few have been decided on the merits in an initial decision, and even fewer have been decided on administrative appeal. Yet Congress intended market dominance to be a practical test requiring a determination of jurisdiction within 90 days. 49 U.S.C. §10709(b).

II. THE ICC AND THE COURT OF APPEALS IGNORED THE INTENT OF CONGRESS IN INTERPRETING THE STATUTE

Despite its importance, the court of appeals' *en banc* decision devoted very little attention to the central question: whether the Commission's construction of the 4-R Act definition of market dominance was correct. The court did not conduct an independent review and mistakenly chose to defer to the ICC's non-contemporaneous construction of the 4-R Act. Moreover, the court of appeals' cursory review of the statute and legislative history is fundamentally flawed because it ignores the plain meaning of the statute and misconstrues the intent of Congress. Review by this Court is necessary to rectify these errors.

A. The Statutory Construction Adopted by the ICC and the Court of Appeals Violates the Plain Meaning and Congressional Intent

The ICC's construction of the market dominance statute permits the very result Congress sought to avoid when it enacted the law — turning a threshold jurisdictional determination into an ultimate regulatory standard that can be met only after the conclusion of a long antitrust-type trial. Congress sought to avoid "lengthy antitrust-type litigation" by designing a market dominance standard not as "an ultimate regulatory standard" but rather "as a threshold test to direct the Commission's regulatory activities into areas where the public interest needs protection. . ." S. Rep. No. 94-499, 94th Cong., 2d Sess. 53 (1976).

To accomplish its twin goals of avoiding regulatory delay and preventing the jurisdictional test from becoming an ultimate regulatory standard, Congress eliminated the complexities associated with case-by-case market definition under the antitrust laws by carefully defining and limiting the relevant market for market dominance purposes to the transportation of the same products between the same origin and destination as

that to which the challenged rate applies. The literal meaning of the 4-R Act market dominance definition precludes the ICC from considering product and geographic competition.

Market dominance is defined in Section 10709(a) as "an absence of effective competition for the transportation to which a rate applies" (App. SA-1), or, as originally worded in the 4-R Act Section 202(b), "an absence of effective competition for the traffic or movement to which a rate applies." (App. SA-6).¹³ Thus, effective competition is limited to transportation alternatives that can provide competition "for the transportation to which a rate applies." Because commodities move between specified origin and destination points, competition must be in the form of other carriers or modes that can provide the same point-to-point service. *Ex Parte No. 320*, 353 I.C.C. at 904-05 (App. H-10); *WCTL I*, 694 F.2d at 390 (App. C-18). Thus, the plain meaning of the market dominance provision precludes Commission consideration of product and geographic competition.

This plain meaning was considered "explicit" by the ICC in *Ex Parte No. 320*, 353 I.C.C. at 905 (App. H-10),¹⁴ and found to

¹³No substantive change was intended by the codification of the Interstate Commerce Act in 1978. See note 2, page 3, *supra*.

¹⁴The ICC commissioners who had helped shepherd the 4-R Act definition of market dominance through Congress had relied on the meaning of the statutory terms in the transportation industry when stating that the statutory language specifically excluded consideration of product and geographic competition:

When used in this context in the transportation industry, the word "movement" refers to transportation *from a single origin point to a single destination point*, while the word "traffic" commonly denotes transportation services *from a named set of points to another point or set of points*; from specific areas to rate groups or in blanket areas; or between stated mileage brackets on particular commodities in a given territory. *There is no language in the legislation which would warrant the extension of the*

[footnote continued]

be clear by the dissenting members of the *en banc* court, *WCTL II*, 719 F.2d at 780-782 (App. A-14 to A-16).¹⁵ The failure to consider this plain meaning reflects an improper approach to statutory interpretation by the ICC and the court of appeals. See *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *Howe v. Smith*, 452 U.S. 473, 483 (1981); *Teamsters v. Daniel*, 439 U.S. 551, 558 (1979).

In addition to carefully defining the term market dominance to exclude product and geographic competition, Congress called upon the ICC to promulgate market dominance rules "designed to provide for practical determination without administrative delay." 4-R Act §202(b) (App. SA-6). As this Court is aware from its analysis of the records in antitrust proceedings, selec-

[footnote continued]

phrase the traffic or movement to which the rate applies, beyond transportation services which are comparable to that described in the issue tariff.

353 I.C.C. at 904-905 [emphasis added] (App. H-10).

¹⁵The dissenting judges also relied on section 205 of the Staggers Act (App. SA-10 to SA-12) to support the plain reading of the statute:

The Staggers Act demonstrates that Congress knew the economic significance of product-geographic competition and referred specifically to those factors when it thought them appropriate. Section 205(a)(1) of the Act requires the Commission to initiate a proceeding to determine whether, and to what extent, "product competition" (defined by the statute to include both what we have called product and geographic competition) should be considered in determining the reasonableness of rates. The instruction is not set forth in the U.S. Code but is contained in the historical note following 49 U.S.C.A. §10701a (West Special Pamphlet 1983). Section 205(a) expressly recites that this directive shall not be construed as altering the meaning, use, or interpretation by the Commission, the courts, or any party of the term "market dominance" . . .

WCTL II, 719 F.2d at 782 [footnote omitted] (App. A-17).

tion of the relevant product and geographic markets in antitrust cases is always a complex and difficult task.¹⁶

As this Court has noted, a "primary purpose of the 4-R act amendments was to end 'excessive regulatory delay.' "*Southern Ry. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 457 n.10 (1979), quoting S. Rep. No. 94-499, *supra*, at 15. The Commission and the court of appeals both ignored this express Congressional intent — as particularly set forth in Section 202(b) of the 4-R Act with respect to market dominance — to define and limit the scope of the Commission's market dominance analysis: to avoid the inevitable delays that would occur if the agency had to consider product and geographic competition in those individual rate cases where a market dominance determination is required.

The Commission and the court of appeals also failed to consider the fact that, in the deliberations leading to the enactment of the Staggers Act, Congress expressed the view that the 4-R Act definition of market dominance as adopted in the ICC's 1976 decision in *Ex Parte No. 320* (App. H-9 to H-15), should continue in effect. During its consideration of the Staggers Act, Congress rejected a provision (House Report at 4-5, 55-56) which would have specifically required the ICC to consider product and geographic competition in determining jurisdiction and voted to retain the 4-R Act definition. See, 126 Cong. Rec. 19398-19413 (1980). Had the Commission and the court of appeals properly examined the statutory language and the intent of

¹⁶See, e.g., *United States v. Marine Bancorporation*, 418 U.S. 602 (1974); *United States v. Connecticut National Bank*, 418 U.S. 656 (1974); *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973); *FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962).

Congress as revealed by the legislative history, they could not have arrived at their incorrect construction of the statute.¹⁷

This Court has held that, when Congress re-enacts a statute while indicating its approval of an administrative or other interpretation thereof, Congress is considered to have adopted and ratified that interpretation, and the courts are bound to follow it. *United States v. Sheffield Bd. of Commissioners*, 435 U.S. 110, 134-135 (1978), and cases there cited. The legislative history of the Staggers Act plainly indicates that Congress intended to adopt the "existing law" on market dominance and did not intend "that there be any change in the meaning of the term . . ." Conference Report at 88. Where the Congress has specifically considered and rejected a legislative change to the market dominance definition that would have directed consideration of product and geographic competition, this pointed and focused legislative action is sufficient to invoke this doctrine of re-enactment. *Bob Jones University v. United States*, 103 S. Ct. 2017, 2032-34 (1983), and cases there cited; *Interstate Natural Gas Association v. FERC*, 716 F.2d 1, 10 (D.C. Cir. 1983).¹⁸

B. The Court of Appeals Abdicated Its Duty to Interpret the Statute.

1. Role of the Courts in Statutory Construction.

Under accepted principles of judicial review, this Court has held that the courts are the "final authorities on issues of statutory construction." *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981). As explained by this Court:

¹⁷See Generally, Market Dominance in the Staggers Act, 48 I.C.C. Prac. J. 662 (1981).

¹⁸See also *Association of American Railroads v. ICC*, 564 F.2d 486, 493-94 (1977).

When the agency's decision is premised on its understanding of a specific Congressional intent, however, it engages in the quintessential judicial function of deciding what a statute means. In that case, the agency's interpretation, particularly to the extent it rests on factual premises within its expertise, may be influential, but it cannot bind a court. *General Electric Co. v. Gilbert, supra*, *Zuber v. Allen*, 396 U.S. 168, 192-193 (1969); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Bureau of Alcohol, Tobacco and Firearms v. FLRA, 104 S. Ct. 439, 445 n.8 (1983).

The court of appeals abdicated its role as one of the "final authorities" on statutory construction. Instead of making the independent statutory analysis required by the precedents of this Court, the court of appeals improperly deferred to the ICC's changed, non-contemporaneous interpretation that Congress had rejected. *WCTL II*, 719 F.2d at 777 (App. A-7). As this Court stated in *Zuber v. Allen*, 396 U.S. 168 (1969), the agency's reading of its enabling statute is "only one input in the interpretational equation. . . . The Court may not abdicate . . . ultimate responsibility to construe the language employed by Congress." *Id.* at 192-193.

2. *The ICC's Contemporaneous Construction of the Statute Was Ignored by the Court of Appeals.*

In carrying out the judicial task of interpreting the statutes, the decisions of this Court make clear that a contemporaneous construction of a statute by those agency officials who participated in the legislative deliberations leading to its enactment should be accorded "great weight" by reviewing courts. *Zuber v. Allen*, 396 U.S. 168, 192 (1969). *Accord, Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Development Co. v. International Union of Elec.*, 367 U.S. 396, 408 (1961); *United States v.*

American Trucking Associations, 310 U.S. 534, 549 (1940). Nevertheless, the court of appeals ignored the ICC's contemporaneous construction despite the fact that the ICC officials who drafted that opinion worked side by side with the Congress in drafting the 4-R Act market dominance standard. See *Ex Parte No. 320*, 353 I.C.C. at 940-47 (App. H-16 to H-27). None of the ICC commissioners who decided *Ex Parte No. 320 (Sub-No. 2)* were with the agency in 1976, nor were any involved in the legislative deliberations leading to the enactment of the 4-R Act in 1976. The ICC's contemporaneous construction was upheld by the D.C. Circuit in *ATSF*, and that initial exegesis presents a comprehensive analysis of the text, legislative history and intent underlying the 4-R Act that is deserving of deference. *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 410-411 (1975). A non-contemporaneous, inconsistent interpretation of statutory language, such as that presented by the ICC in its 1981 decision, is due much less weight. *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 869-72, 893-94 (D.C. Cir. 1978).

The court of appeals apparently felt justified in ignoring the ICC's contemporaneous statutory construction, and deferring to the ICC's subsequent re-interpretation of the same provision, because "none can doubt the ICC's authority to change its mind in light of experience." *WCTL II*, 719 F.2d at 778 (App. A-9 to A-10). The ICC asserted that its experience in implementing the 4-R Act demonstrated that undue delay and regulatory complexity would not occur if the agency considered product and geographic competition. *Ex Parte No. 320 (Sub-No. 2)*, 363 I.C.C. at 130 (App. D-18). The ICC offered no supporting analysis for this conclusion, for none could have been presented. The administrative impossibility of considering product and geographic competition while making the timely and accurate market dominance determination that is required by the 4-R Act §202(b) (App. SA-6) was initially identified in *Ex Parte No. 320*, and was thereafter confirmed by the agency and

its retained experts on several occasions.¹⁹ No evidence of record supports the ICC's reversal of its 1976 feasibility analysis. The court of appeals erred in deferring to the agency's reasoning.

The court of appeals apparently was unconcerned that the ICC's stated reasons in support of its new statutory constructions flew in the face of all available evidence, as it failed to address this issue, despite the fact that it was a focal point of petitioners' arguments to the court. However, the decisions of this Court require reviewing courts to set aside agency decisions when the agency "offer[s] an explanation for its decision that runs counter to the evidence before the agency. . . ." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856, 2867 (1983). The court of appeals also violated this basic principle of review.

The only other justification offered by the ICC for its new reading of the 4-R Act was the passage of the Staggers Act. Specifically, the Commission stated: "we believe that Congress, in the Staggers Act, intended a much more flexible interpretation." *Id.* at 129 (App. D-16). This contention was so incorrect that it was expressly abandoned by counsel for the ICC in the review proceedings before the court of appeals. *WCTL I*, 694 F.2d at 389 n.52 (App. C-17). Indeed, both the majority and the dissent in the *en banc* decision concluded that the legislative history of the Staggers Act did not change the meaning or intent

¹⁹See, e.g., Ex Parte No. 320 (Sub-No. 1), *Rail Market Dominance and Related Considerations*, 45 Fed. Reg. 3353, 3354 (Jan. 17, 1980) ("the Commission and the parties will almost invariably lack the time needed to conduct the analysis needed to define the market involved, much less a detailed market share analysis. . .."); Kearney, Management Consultants, *A Study to Perform an in-Depth Analysis of Market Dominance and Its Relationship to Other Provisions of the 4-R Act* (Interim Report II), at 19 (April 10, 1979) ("Whatever the procedure developed for defining the market, the history of antitrust enforcement provides ample evidence that market definition can become a prolific source of litigation and dispute.")

of the governing 4-R Act standard. *WCTL II*, 719 F.2d at 777, 780 n.1 (App. A-6, A-14).

The abdication by the court of appeals of its role as the final authority on the construction of the market dominance statute has produced results so contrary to the intent of Congress as to require review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM L. SLOVER
 *C. MICHAEL LOFTUS
 DONALD G. AVERY
 JOHN H. LeSEUR
 1224 17th Street, N.W.
 Washington, D.C. 20036
 (202) 347-7170

J. RAYMOND CLARK
 MARY TODD FOLDES
 1225 19th Street, N.W.
 Washington, D.C. 20036
 (202) 659-0770

JOHN F. DONELAN
 JOHN M. CLEARY
 FREDERIC L. WOOD
 NICHOLAS J. DiMICHAEL
 914 Washington Building
 Washington, D.C. 20005
 (202) 783-1215

JOHN GUANDOLO
 A.T. UDRYS
 Room 200
 1090 Vermont Avenue, N.W.
 Washington, D.C. 20005
 (202) 783-8131

EDMUND E. HARVEY
 1101 Vermont Avenue, N.W.
 Washington, D.C. 20005
 (202) 289-3000

HAROLD E. SPENCER
 RICHARD S.M. EMRICH
 20 North Wacker Drive
 Chicago, IL 60606
 (312) 236-0204

JOHN MOLM
 ROBERT P. EDWARDS, JR.
 Suite 1400 Candler Bldg.
 127 Peachtree Street, N.W.
 Atlanta, GA 30303
 (404) 658-8000

HERBERT J. MARTIN
 FREDERICK W. CLAYBROOK, JR.
 1100 Connecticut Avenue, N.W.
 Washington, D.C. 20036
 (202) 452-5959

MARTIN W. BERCOVICI
 LAWRENCE P. HALPRIN
 1150 17th Street, N.W.
 Washington, D.C. 20036
 (202) 457-1100

*Counsel of Record for Petitioners

HARRY H. VOIGT
LEONARD M. TROSTEN
MICHAEL F. McBRIDE
DANIEL J. CONWAY
Suite 1100
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 457-7500

DENNIS N. BARNES
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5125

DICKSON R. LOOS
BARRY ROBERTS
600 Maryland Avenue, S.W.
Washington, D.C. 20006
(202) 484-9090

DAVID A. SUTHERLUND
1120 G Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 628-2788

CHARLES J. McCARTHY
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 393-5710

JOHN OBERDORFER
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

DANIEL S. KUNTZ
Capitol Building
Bismarck, N.D. 58505
(701) 224-2400

Attorneys for Petitioners

Dated: February 13, 1984

IN THE
Supreme Court of the United States
 October Term, 1983

FEB 13 1984

ALEXANDER L. STEVAS
 CLERK

WESTERN COAL TRAFFIC LEAGUE; THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE; EDISON ELECTRIC INSTITUTE; NATIONAL COAL ASS'N; CONSUMER OWNED POWER COALITION; THE CHEMICAL MANUFACTURERS ASS'N; THE ALUMINUM ASS'N, INC.; THE FERTILIZER INSTITUTE; AMERICAN PAPER INSTITUTE; AMERICAN IRON AND STEEL INSTITUTE; COPPER DEVELOPMENT ASS'N, INC.; THE COMMITTEE ON TRANSPORTATION AND DISTRIBUTION OF THE SOCIETY OF THE PLASTICS INDUSTRY, INC.; INTERNATIONAL MINERALS & CHEMICAL CORP.; ARKANSAS-MISSOURI POWER CO.; ARKANSAS POWER & LIGHT CO.; LOUISIANA POWER & LIGHT CO.; MISSISSIPPI POWER & LIGHT CO.; NEW ORLEANS PUBLIC SERVICE, INC.; POTOMAC ELECTRIC POWER CO.; PUBLIC SERVICE COMPANY OF INDIANA, INC.; SOUTH CAROLINA PUBLIC SERVICE AUTHORITY; CENTRAL ILLINOIS LIGHT CO.; IOWA POWER & LIGHT CO.; OKLAHOMA GAS & ELECTRIC CO.; SOUTHWESTERN ELECTRIC POWER CO.; CONSUMERS POWER CO.; COMMONWEALTH EDISON CO.; MADISON GAS & ELECTRIC CO.; NEW YORK STATE ELECTRIC AND GAS CORP.; PENNSYLVANIA POWER AND LIGHT CO.; UNION ELECTRIC CO.; WISCONSIN POWER & LIGHT CO.; WISCONSIN ELECTRIC POWER CO.; WISCONSIN PUBLIC SERVICE CORP.; CAROLINA POWER & LIGHT CO.; DUKE POWER CO.; SOUTH CAROLINA ELECTRIC & GAS CO.; VIRGINIA ELECTRIC AND POWER CO.; KERR-McGEE CORP.; ELECTRIC FUELS CORP.; ALABAMA POWER CO.; GEORGIA POWER CO.; GULF POWER CO.; MISSISSIPPI POWER CO.; SOUTHERN COMPANY SERVICES, INC.; GULF STATES UTILITIES CO.; NORTH DAKOTA PUBLIC SERVICE COMMISSION; NORTH DAKOTA STATE WHEAT COMMISSION; CHAMBER OF COMMERCE OF FARGO, NORTH DAKOTA; COASTAL STATES ENERGY CO., *Petitioners,*

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; ASSOCIATION OF AMERICAN RAILROADS; ATCHISON, TOPEKA AND SANTA FE RY. CO.; BURLINGTON NORTHERN R.R. CO.; CHESSIE SYSTEM; CHICAGO AND NORTH WESTERN TRANSPORTATION CO.; CONSOLIDATED RAILROAD COMPANY; DENVER AND RIO GRANDE WESTERN R.R. CO.; ILLINOIS CENTRAL GULF R.R. CO.; MISSOURI PACIFIC R.R. CO.; NORFOLK AND WESTERN RY. CO.; SEABOARD COAST LINE R.R. CO.; SOO LINE R.R. CO.; SOUTHERN PACIFIC TRANSPORTATION CO.; SOUTHERN RY. CO.; UNION PACIFIC R.R. CO., *Respondents.*

**On Petition for Writ of Certiorari to the
 United States Court of Appeals for the Fifth Circuit**

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Dated: February 13, 1984

WILLIAM L. SLOVER
*C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LeSEUR
1224 17th Street, N.W.
Washington, D.C. 20036
(202) 347-7170

J. RAYMOND CLARK
MARY TODD FOLDES
1225 19th Street, N.W.
Washington, D.C. 20036
(202) 659-0770

JOHN F. DONELAN
JOHN M. CLEARY
FREDERIC L. WOOD
NICHOLAS J. DIMICHAEL
914 Washington Building
Washington, D.C. 20005
(202) 783-1215

JOHN GUANDOLO
A.T. UDRYS
Room 200
1090 Vermont Avenue, N.W.
Washington, D.C. 20005
(202) 783-8131

HARRY H. VOIGT
LEONARD M. TROSTEN
MICHAEL F. McBRIDE
DANIEL J. CONWAY
Suite 1100
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 457-7500

DENNIS N. BARNES
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5125

DICKSON R. LOOS
BARRY ROBERTS
600 Maryland Avenue, S.W.
Washington, D.C. 20006
(202) 484-9090

*Counsel of Record for Petitioners

EDMUND E. HARVEY
1101 Vermont Avenue, N.W.
Washington, D.C. 20005
(202) 289-3000

HAROLD E. SPENCER
RICHARD S.M. EMRICH
20 North Wacker Drive
Chicago, IL 60606
(312) 236-0204

JOHN MOLM
ROBERT P. EDWARDS, JR.
Suite 1400 Candler Bldg.
127 Peachtree Street, N.W.
Atlanta, GA 30303
(404) 658-8000

HERBERT J. MARTIN
FREDERICK W. CLAYBROOK, JR.
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-5959

MARTIN W. BERCOVICI
LAWRENCE P. HALPRIN
1150 17th Street, N.W.
Washington, D.C. 20036
(202) 457-1100

DAVID A. SUTHERLUND
1120 G Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 628-2788

CHARLES J. McCARTHY
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 393-5710

JOHN OBERDORFER
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

DANIEL S. KUNTZ
Capitol Building
Bismarck, N.D. 58505
(701) 224-2400

Attorneys for Petitioners

APPENDIX A

**WESTERN COAL TRAFFIC LEAGUE
and its Members, et al., Petitioners,**

v.

**UNITED STATES of America and
Interstate Commerce Commission,
Respondents.**

**Nos. 81-4257, 81-4259, 81-4277, 81-4299, 81-4334,
81-4347, 81-4354, 81-4357, 81-4365 to 81-4369, 81-4373,
81-4415, 81-4423 and 82-4021.**

**United States Court of Appeals,
Fifth Circuit.**

Nov. 14, 1983.

Petitions for Review of Orders of the Interstate Commerce Commission.

Before CLARK, Chief Judge, BROWN, RUBIN, REAVLEY, POLITZ, TATE, JOHNSON, WILLIAMS, JOLLY and HIGGINBOTHAM, CIRCUIT Judges.*

JOHNSON, Circuit Judge:

Prior to 1976, the Interstate Commerce Commission (ICC) had unfettered authority to review all railroad rates under the "just and reasonable" standard promulgated by Congress.¹

*Judges Thoms Gibbs Gee, Carolyn Dineen Randall, and Will Garwood recused themselves and did not participate in the decision.

¹Former section 1(5) of the Interstate Commerce Act provided that "[a]ll charges made for any service rendered or to be rendered . . . shall be just and reasonable and every unjust and unreasonable charge . . . is prohibited and declared unlawful." The issues in this case are reflected in the revised language of the recodification and amended Act which now qualifies the reasonableness requirement: "If the Commission determines . . . that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier must be reasonable, 49 U.S.C. 10701a(b)."

Then, through enactment of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4R Act),² Congress sought to reduce regulatory restraints on railroad pricing decisions.³ Under the 4R Act, the ICC now has jurisdiction to review a rate only if it determines that the carrier can exclude effective competition to the extent that the carrier has "market dominance," defined as "an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies."

Whether the ICC, in administering the "market dominance"⁴ standard, may consider evidence of product and geographic competition is the issue before the *en banc* Court.⁵ A divided panel of this Court concluded that the 4R Act "limits the definition of market dominance to transportation of the same product from the same origin to the same destination." *See Western Coal Traffic League v. United States*, 694 F.2d 378, 383 (5th

²Pub.L. No. 94-210, 90 Stat. 31 (1976); to be incorporated into the U.S.Code as part of the Revised Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*

³See § 101 of the 4R Act.

⁴Market dominance was defined originally as "an absence of effective competition from other carriers or modes of transportation for the traffic or movement to which a rate applies." Pub.L. No. 94-210, § 202(b), 90 Stat. 31 (1976), codified at 49 U.S.C. § 1(5)(c) (1976). That language was revised and re-enacted without substantive change when the Interstate Commerce Act was recodified in 1978.

⁵Product competition refers to competition generated as a result of the availability of substitute products. For example, if a power plant in Texas generally operated on coal transported by rail from a mine in Wyoming but also could operate on natural gas from a field in Wyoming, the indirect competition from the natural gas industry would constitute "product competition." Geographic competition refers to transportation of the same product from a different location. For example, if the Texas power plant could obtain coal from a source other than the mine in Wyoming (*i.e.*, Pennsylvania), the indirect competition from the Pennsylvania mine would constitute geographic competition.

Cir. 1982), *reh'g en banc granted*, Order of March 7, 1983. Since we conclude that such a result fails to afford the ICC the deference due under existing law and places undue emphasis upon certain terms contained in the 4R Act, we affirm the ICC's orders allowing consideration of product and geographic competition. We also affirm the ICC's guidelines as in conformance with the congressional directive to the ICC to establish standards and procedures to be utilized in making the market dominance determination.

I. *Background and Procedural History*⁶

Throughout the nineteenth century, railroads constituted the dominant mode of transportation in the United States. Unaffected by any meaningful competition, the railroads were able to set rates that often proved to be unjust and unreasonable. As Justice Fortas noted in *American Truck Associations v. Atchison, T. & S.F. Railroad Co.*, 387 U.S. 397, 87 S.Ct. 1608, 1613, 18 L.Ed.2d 847 (1967): "In this country, the railroads had a practical monopoly of freight transportation, and secret rebates, special rates to favorite shippers, and discriminations flourished." Hence, in 1887, the Interstate Commerce Act was enacted and virtually all interstate railroad rates became subject to exacting scrutiny under the just and reasonable standard set forth in the Interstate Commerce Act. 49 U.S.C. § 1(5) (1976).

By 1976, however, many of the justifications for extensive regulation of railroad rates no longer existed. The premise of railroad dominance had become outdated and, as the ICC found as early as 1971, "there are few significant commodities which are not practically susceptible to transportation by at least two competing modes of surface transportation." *Illinois Central Gulf Railroad—Acquisition G., M. & O., et al.*, 338 I.C.C. 805, 836 (1971). Additionally, as was noted by Congress

⁶For an exhaustive treatment of the history of the 4R Act see *Western Coal Traffic League v. United States*, 694 F.2d at 384-90.

in enacting the 4R Act, significant financial losses were being incurred by the railroads and extensive, industry-wide regulation was no longer justified. Sen. Rep. No. 499, 94 Cong. 2d Sess. 2-3, reprinted at 1976 U.S. Code Cong. & Ad. News 14, 15-17. Nevertheless, recognizing that certain carriers still were unrestrained by effective competition, Congress refused to completely deregulate the railroad industry.

The 4R Act evidences Congress' intent to deregulate the railroad industry only in the areas in which effective competition exists. Today, in order for the ICC to intercede in ratemaking practices, it must make an initial, jurisdictional determination that the carrier has market dominance. The 4R Act defines market dominance as "an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. § 10701a(b)(1) (Supp. IV 1980). Significantly, however, Congress empowered the ICC to adopt "standards and procedures" for determining whether a railroad possessed market dominance.⁷

Soon after the enactment of the 4R Act, the ICC embarked upon its attempt to provide standards and procedures to determine the market dominance issue. The ICC's first attempt at establishing such standards and procedures occurred in *Ex Parte No. 320*. See *Ex Parte No. 320*, Spec. Proc. for Findings of Market Dominance, 353 I.C.C. 873, modified, 355 I.C.C. 12

⁷The pertinent statutory language, set forth in the 4R Act, § 202(b), codified at 49 U.S.C. § 1(5)(d) (1976), repealed by Pub.L. No. 95-473, § 4(b), (c), 92 Stat. 1337, 1466-70 (1978), was:

Within 240 days after the date of the enactment of this subdivision, the Commission shall establish, by rule, standards and procedures for determining in accordance with Section 15(9) of this part, whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rules shall be designed to provide for a practical determination without administrative delay.

(1976).⁸ One of the many issues presented involved the role of product and geographic competition in determining whether a carrier possessed market dominance. Although the Department of Justice, Department of Transportation, and the railroad industry urged the ICC to consider evidence of product and geographic competition, the ICC determined that such evidence would not be considered. Two reasons for this initial conclusion were advanced by the ICC. First, the ICC concluded that such evidence would create complex antitrust-type litigation and, second, the ICC felt that the statutory definition of market dominance precluded consideration of such competition. See *Ex Parte No. 320*, 353 I.C.C. at 904-05.

The regulations initially advanced by the ICC in *Ex Parte No. 320* underwent judicial attack in *Atchison, T. & S.F. Railroad v. ICC*, 580 F.2d 623 (D.C.Cir.1978). As in the case *sub judice*, a major issue before the D.C. Circuit involved the ICC's refusal to consider geographic and product competition. Although the D.C. Circuit ultimately upheld the ICC's regulations, finding "sufficient basis in the statutory language and purpose to merit our deferral to the Commission's view," *id.* at 634, the court noted that the ICC's construction "may appear to some as an attempt to attribute excessive significance to a terse statutory clause." *Id.* In concluding, the D.C. Circuit emphasized that its role was one "of deference and deferral" and noted that "[t]he Commission will be in a position to evaluate the regulation more fully in light of experience." *Id.*

After several years of experience with the regulations promulgated in *Ex Parte No. 320* and after completion of several studies,⁹ the ICC proposed removal of many of the cost

⁸See *Western Coal Traffic League v. United States*, 694 F.2d at 385-86 for further explication of the provisions set forth in *Ex Parte No. 320*.

⁹See *Western Coal Traffic League v. United States*, 694 F.2d at 386 n. 33 and material cited therein.

presumptions outlined in *Ex Parte No. 320* and proposed that litigants present any relevant evidence on the issue of market dominance, specifically including evidence of geographic and product competition. See *Ex Parte No. 320 (Sub-No. 1), Rail Market Dominance and Related Considerations*, 45 Fed.Reg. 3353 (proposed January 17, 1980). While the ICC was considering comments on its proposed decision, however, Congress enacted new legislation.

In an effort to hasten railroad rate deregulation, Congress, in 1980, enacted a second major deregulation statute, the Staggers Act. Staggers Rail Act of 1980, Pub.L. No. 96-448, 94 Stat. 1895, codified in various sections of 49 U.S.C. § 10101, *et seq.* By a new provision contained in the Staggers Act, 49 U.S.C. § 10709(d), Congress required the ICC to deregulate a rail rate insofar as the carrier's rate of return falls below a specified percentage of the costs incurred by the carrier in providing the service. Additionally, even if the rail rate is above that percentage, the ICC still must determine whether market dominance exists. 49 U.S.C. § 10709(a), (b). Although Congress did revamp the ICC's regulations in these respects, it did not alter the market dominance statute enacted in the 4R Act and, in fact, emphasized that it did not intend "in any way to restrict the ability of the Commission to apply [the market dominance] concept, both in its regulations and individual cases." H.Rep. No. 96-1430, 96th Cong., 2d Sess. 89 (1980), U.S.Code Cong. & Admin.News 1980, p. 3978, 4120. Also, it is important to note that Congress was aware of the ICC's stated intent to consider product and geographic competition when the Staggers Act was debated. See 359 I.C.C. at 736-37.

Finally, following enactment of the Staggers Act, the ICC instituted *Ex Parte No. 320 (Sub. No. 2)*, the proceeding that gave rise to this case, to consider changes in its market dominance rules. As noted previously, the ICC reaffirmed its decision to consider evidence of product and geographic competition in making the market dominance determination. On review in this

Court, the petitioners attacked the ICC's new rules on a variety of grounds, including a claim that product and geographic competition was inadmissible under the express terms of the 4R Act. A divided panel of this Court held that the ICC lacked statutory authority to consider evidence of product and geographic competition. Thereafter, this Court granted rehearing *en banc* and the case was orally argued before the *en banc* Court on June 7, 1983.

II. *Product and Geographic Competition*

The petitioners challenge the validity of the ICC's regulations allowing consideration of product and geographic competition. They contend that the regulations exceed the ICC's statutory authority.

We begin, as we must, with a recognition of the limited role this Court plays in reviewing an administrative agency's construction of its statutory authority and the regulations promulgated pursuant thereto. Far removed from the practical realities of the day-to-day regulation of this nation's railroads, we must defer to the agency's interpretation of the statute and affirm that interpretation if "it has a reasonable basis in law." See *Aberdeen & Rockfish Railroad Co. v. United States*, 682 F.2d 1092, 1096 (5th Cir.1982), quoting *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 88 S.Ct. 929, 935, 19 L.Ed.2d 1090 (1968). That the members of this Court might have construed the statute differently is inconsequential. *Batterton v. Francis*, 432 U.S. 416, 97 S.Ct. 2399, 2405, 53 L.Ed.2d 448 (1977). Moreover, when an agency, pursuant to congressional mandate, has adopted regulations designed to effectuate its statutory duties, this Court will not set aside such regulations unless the agency has exceeded its statutory authority or if its regulations so far depart from the statutory authorization that they can be interpreted as "arbitrary, capricious, an abuse of discretion, or otherwise no in accordance with law." 5 U.S.C. § 706(2)(A); *Batterton v. Francis*, 97 S.Ct. at 2405-06.

As we have seen, the 4R Act clearly evinces Congress' intent to deregulate the railroad industry only in areas in which effective competition exists. In both the 4R Act and the Staggers Act, Congress stressed its conviction that competitive forces, rather than regulations should be used to set price and service levels where effective competition prevails. Nonetheless, Congress clearly intended to retain the protections of ICC rate regulation in areas in which no effective competition prevails. In determining whether the ICC's decision to consider product and geographic competition exceeds its statutory authority, we must recognize Congress' stated policy of deregulating rail rates only in areas in which effective competition exists. "[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object or policy."¹⁰ See *Philbrook v. Glodgett*, 421 U.S. 707, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975).

¹⁰As we have seen, a divided panel of this Court held that the 4R Act's definition of market dominance precluded consideration of indirect competition (*i.e.*, product and geographic competition) since the definition "refers to 'effective competition . . . for the transportation to which a rate applies,'" not to competition *with* that transportation." *Western Coal Traffic League v. United States*, 694 F.2d at 390. Although the panel majority conceded that indirect competition could be as effective as direct competition and that consideration of indirect competition would increase the number of rates immunized from regulation, *id.* at 382, it nonetheless concluded that Congress' choice of the preposition "for" instead of "with" demonstrated congressional intent to preclude consideration of indirect competition. We are hesitant to rely heavily upon a vague congressional use of prepositions in determining the extent of the ICC's jurisdiction to review rail rates.

As the panel majority conceded, to preclude the ICC's consideration of indirect competition will increase the number of rates subject to ICC regulation. Such a result clearly is inconsistent with Congress' repeated attempts to deregulate the railroad industry. Congress stressed the need for deregulation in enacting the 4R Act and re-emphasized that need in enacting the Staggers Act. In light of this congressional intent to deregulate all rates subject to effective competition, we are most hesitant to resolve the market dominance issue on

The 4R Act does not contain a detailed congressional formula for determining market dominance. Instead, it contains a generally phrased test designed to achieve a stated goal — deregulation of rail rates subject to effective competition. Congress not only expected but required the ICC to undertake the task of developing "standards and procedures" for determining "whether and when a [railroad] possesses market dominance." Quite clearly, the ICC was given broad statutory authority to prescribe standards and procedures to be utilized in facilitating railroad rate deregulation. Well-established precedent requires us to uphold the ICC's regulations unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

The regulations adopted by the ICC in *Ex Parte No. 320* (*Sub. No. 2*) cannot be considered arbitrary, capricious, an abuse of discretion, or inconsistent with law. Adopted pursuant to congressional mandate, the regulations reflect considered judgment in light of practical experience. Although the ICC's decision to consider product and geographic competition depart from prior ICC decisions, none can doubt the ICC's authority

the basis of a prepositional controversy. As the Supreme Court has repeatedly held, "the width of administrative authority must be measured in part by the purposes for which it was conferred." *Persian Basin Area Rate Cases*, 390 U.S. 747, 776, 88 S.Ct. 1344, 1364, 20 L.Ed.2d 312 (1967). The ICC's administrative authority undoubtedly was created in an attempt to deregulate all rates subject to effective competition. We should not interpret the 4R Act in a manner inconsistent with that purpose. Moreover, even if the plain terms of the 4R Act suggest such a result, we must heed the Supreme Court's directive that "even when the plain meaning [does] not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' " the Court should follow that policy instead of the literal words. See *United States v. American Trucking Ass'n*, 310 U.S. 534, 543, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345 (1970), quoting *Ozawa v. United States*, 260 U.S. 178, 194, 43 S.Ct. 65, 67, 67 L.Ed. 199 (1922).

to change its mind in light of experience. *American Truck Associations v. Atchison T. & S.F. Railroad Co.*, 87 S.Ct. at 1613 (1967). Certainly, regulatory agencies "are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *Id.*

The ICC advanced the following reasons in support of its decision to consider product and geographic competition in making the market dominance determination.

We believe that [our prior] interpretation was unnecessarily restrictive. There is no evidence in the 4R Act that we consider only "direct" competition from other carriers or modes. Since the traffic to which the rate applies faces competition from other sources or destinations of the same product or from substitute products the carriers transporting that traffic face "indirect" competition from other carriers "[E]ffective competition from other carriers or modes of transportation, for the traffic to which the rate applies" means that, if a carrier raises the rate for such traffic, then some or all of that traffic will be lost to other carriers or modes.

Additionally, the ICC responded to the contention that its new regulations were unmanageable by stating:

In general, geographic or product competition will be deemed to be present if it is established that alternative supplies of the same or a close substitute product exist and that carriers transporting these same or close substitute commodities from the various sources to the various destinations compete with one another for the traffic in question. Whether such competition is judged to be effective will depend on evidence concerning the substitutability of one supply source or destination for another or one product for another. If, in a particular case, the Commission finds that the evidence submitted is inconclusive, then such evi-

dence will be given minimal weight in our determination of market dominance. We believe that this is an improvement over our 1976 position that evidence of geographic and product competition be always and automatically excluded from every proceeding.

365 I.C.C. at 130.

Indeed, nothing in the 4R Act evinces congressional intent to preclude consideration of indirect competition. As we have seen, Congress simply sought deregulation of rail rates subject to effective competition. Refusing to set forth a rigid standard for determining when effective competition exists, Congress authorized the ICC to establish appropriate standards and procedures for determining when market forces suffice to regulate rail rates. The ICC is in the best position to determine whether product and geographic competition play a role in the day-to-day fluctuations in rail rates and whether consideration of such evidence is feasible within the requirements of the 4R Act. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197, 1202, 55 L.Ed.2d 460 (1978). Nothing in the 4R Act requires the ICC to make its decisions in a regulatory vacuum ignoring the practical effects of indirect competition. Undoubtedly, if the ICC was required to ignore the effects of indirect competition, certain rates would become subject to regulatory intervention even though the rate is governed by market forces. Such a result flies in the face of Congress' stated policy of deregulation of rates subject to effective market control. As the Final Conference Report to the Staggers Act emphasized, "Whenever there is effective competition, such competition should continue to function as the regulator of the rate rather than the Commission." Hence, we cannot conclude that the ICC exceeded its statutory authority by adopting regulations that will allow it to consider the effects of indirect competition on rail rates in determining whether market dominance exists under the 4R Act. The ICC's interpretation of the 4R Act, when viewed with the deferential at-

titude required under existing precedent, certainly has a reasonable basis in law. See *Aberdeen & Rockfish Railroad Co. v. United States*, 682 F.2d at 1096.

We also note that we find nothing inconsistent with this result in the Staggers Act. Indeed, the Staggers Act reflects a reinforced congressional intent to allow the ICC to continue to promulgate standards and procedures for making the market dominance determination. The Conference Commission Report specifically stated that Congress' action was "not intended in any way to restrict the ability of the Commission to apply this concept, both in its regulations and individual cases." H. Rep. No. 96-1430, 96th Cong. 2d Sess. 88-89 (1980), U.S. Code Cong. & Ad. News 1980, 4120. This is particularly significant, since Congress was aware of the ICC's stated intent to consider product and geographic competition when the Staggers Act was debated. See I.C.C. at 736-77.

III. *The ICC's Market Dominance Guidelines*

The petitioners contend that the ICC's guidelines are at variance with the congressional directive to the ICC in the 4R Act to "establish, by rule, standards and procedures for determining . . . whether and when a carrier possesses market dominance . . . Such rules shall be designed to provide a practical determination without administrative delay." Section 202(b). The panel majority held that the ICC's guidelines conform to the 4R Act's "rule" requirement, but declined to address petitioners' argument that the guidelines lacked the definiteness and predictability of standards and, hence, do not allow the ICC and parties to measure in a practical way whether there is effective competition in a particular situation. *Western Coal Traffic League v. United States*, 694 F.2d at 392. We have reviewed the ICC's guidelines and hold that they satisfy the congressional directive.

The ICC's guidelines do not, of course, enable a party to predict in each case whether market dominance exists. But, the

object of the "standard" requirement in the 4R Act was not to establish hard and fast rules for every situation; the myriad individual circumstances in the complex world of rail transportation make that an impossibility. The guidelines do, however, provide a detailed guide as to what the ICC considers relevant, the placement of the burden of proof, and how to present a case to the ICC. We must remain cognizant of the Supreme Court's direction "that the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress [has] confided the responsibility of substantive judgments." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc.*, 98 S.Ct. at 1202. Only experience will demonstrate the ability of the ICC to manage its new guidelines. As the D.C. Circuit noted in *Atchison, T. & S.F. Railroad v. ICC*, 580 F.2d at 640, "the courts remain open if the Commission is slothful or unwilling to undertake appropriate reconsideration and fine tuning in the light of experience." At this time, we cannot say that the ICC had failed to fulfill the congressional directive. Hence, we affirm the ICC's guidelines.

IV. Conclusion

For the foregoing reasons we affirm the ICC's decision to consider evidence of geographic and product competition. We also affirm the ICC's guidelines since they fulfill the congressional directive to establish standards and procedures for making the market dominance determination.

The original panel of this Court was presented with several issues that are not at issue before the *en banc* Court. See *Western Coal Traffic League v. United States*, 694 F.2d at 385-89, part III, sections 1, 2, 3, and 4. Judge Brown dissented only with regard to the majority's decision on product and geographic competition (part II, section 5). This *en banc* opinion overturns the original panel's opinion with respect to its decision on product and geographic competition (part III, section 5). In all other respects (part III, sections 1, 2, 3, and 4), the

panel's decision is adopted as the opinion of the *en banc* Court.. Hence, all of the objections to the ICC's decision in *Ex Parte No. 320 (Sub. No. 2)* are rejected and the ICC's decision is AF-FIRMED.

ALVIN B. RUBIN, Circuit Judge, with whom REAVLEY, Circuit Judge, joins, dissenting.

The words of the 4-R statute are refreshingly simple and direct: market dominance exists when there is "an absence of effective competition from other carriers or modes of transportation for the traffic or movement to which a rate applies" (emphasis added). 49 U.S.C. § 10709(a) (Supp. IV 1980).¹ Congress gave the Commission no power to reinterpret these plain words but only the authority for 240 days to adopt "standards and procedures" for determining "whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates." 49 U.S.C. § 1(5)(d) (1976).

Competition for a movement of coal by rail from a coal mine in Kentucky to a public utility in the City of Austin, Texas, exists only if some other carrier is willing to move that coal from Kentucky to Austin. That is competition for the "service rendered or to be rendered." That another railroad is able to move coal from a strip mine in Wyoming to Austin creates competition with the Kentucky-Texas movement but not competition for that movement. The Wyoming-Texas carrier is not offering the same service. Even more obviously, the offer by a pipeline to supply an alternate energy source, natural gas, provides economic competition with the Kentucky-Texas move-

¹The Staggers Act, passed in 1980, changed the wording of this definition, but, as the majority opinion concedes, effected no substantive change in it. 49 U.S.C.A. § 10709(a) (West Special Pamphlet 1983) ("an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies"). See *ante* slip op. 704, at ____.

ment but it is not competition *for* that movement. Such products have different physical properties and must be transported in a different manner. The Wyoming-Texas natural gas carrier is, therefore, not offering the same service. It is not competing for the transportation to which the market-dominant rate applies.

In neither case is there competition from other carriers or modes of transportation for the traffic or movement to which the challenged rate applies. That is the type of competition that the statute specifies, not competition from other products or from other geographic areas.

The majority opinion states that the panel opinion relied "heavily on a vague congressional use of prepositions." *Ante*, Slip op. 705, p. ____ at n. 10. The use of the preposition in the statute is not vague, but, in any event, it is not the sole basis for reading the statute as being limited to direct carrier competition.

"The 4R act speaks of 'the traffic or movement to which the rate applies' " an authority eminent in defining terms used in interstate commerce has said. "When used in this context in the transportation industry, the word 'movement' refers to transportation *from a single origin point to a single destination point, while the word 'traffic' commonly denotes transportation services from a named set of points to another point or set of points;* from specific areas to rate groups or in blanket areas; or between stated mileage brackets on particular commodities in a given territory. *There is no language in the legislation which would warrant the extension of the phrase the traffic or movement to which the rate applies, beyond transportation services which are comparable to that described in the issue tariff.*"³

The definition of the meaning the industry attributes to the words in the statute was not by some professed pundit but by the Commission itself, which surely should, after a century of

³Ex Parte No. 320 (Sub-No. 1), 353 ICC at 904-905 (emphasis added).

experience, be conversant with the industrial lexicon. The definition of these terms in the industry has not, I take it, changed since 1976. It was this clarity of language that led the Commission to say in 1976 that the market definition in the statute was "explicit."³

Four years later the definition that was once "explicit" is no longer exact. It has instead acquired "a range of possible interpretations which Congress left to the Commission to fix exactly."⁴ Even if it were permissible to adjust the interpretation somewhat, the same statute cannot either in good conscience or good English be read to say that what is black one day is white the next, that what is day one day is night the next, that what *must* be excluded one day must be permitted the next — or even five years later.

The congressional history does not indicate that the Commission was meant to consider geographic and product competition in determining whether a carrier has market dominance. The Senate Conference Report on the 4R Act merely states:

The Department of Justice had, however, suggested only the consideration of such evidence in rebuttal.
Id., at 633.

While the absence of effective competition test is not intended to strictly conform with the standards of the antitrust laws, it is intended that when the Commission administers the test *it will recognize the absence of forces which normally govern competitive markets.*" (Emphasis added.)

1976 U.S.Code Cong. & Ad.News 148, 163. Far from requiring the Commission to recognize the *presence* of product-geographic competition, this language mandates only that the Commission recognize the *absence* of competitive forces in the railroad industry.

³*Id.*, at 905.

⁴Ex Parte No. 320 (Sub-No. 2), 365 ICC at 129.

The Staggers Act demonstrates that Congress knew the economic significance of product-geographic competition and referred specifically to those factors when it thought them appropriate. Section 205(a)(1) of the act requires the Commission to initiate a proceeding to determine whether, and to what extent, "product competition" (defined by the statute to include both what we have called product and geographic competition) should be considered in determining the reasonableness of rates. The instruction is not set forth in the U.S. Code but is contained in the historical note following 49 U.S.C.A. § 10701a (West Special Pamphlet 1983). Section 205(a) expressly recites that this directive shall not be construed as altering the "meaning, use, or interpretation by the Commission, the courts, or any part of the term 'market dominance' The enactment of [Section 205] shall not be considered by the Commission in any proceeding, or by any court on an appeal from that or any other proceeding, to determine the proper scope of the term 'market dominance' " Pub.L. No. 96-448, § 205(a)(3)(B), 94 Stat. 1906 (1980).⁵

The Commission's interpretation of the statute would read "effective competition . . . for the transportation to which a rate applies" to mean "effective competition *with* the transportation." This disregards the words requiring competition "from other carriers or modes of transportation."⁶ Indeed,

⁵On May 14, 1981, the Commission issued a decision concluding that such competition would not be considered as a reasonableness issue. Ex Parte No. 320 (Sub-No. 2), Market Dominance Determinations, 365 I.C.C. 1 (1981), *petition for review filed sub nom. Association of American Railroads v. United States*, No. 81-2249 (D.C.Cir., filed Nov. 30, 1981), transferred, No. 82-4082 (5th Cir. Feb. 26, 1982), consolidated with No. 81-4257, *motion to sever granted*, June 17, 1982.

⁶49 U.S.C.A. § 10709(a) (West Special Pamphlet 1983). The Commission's interpretation would also ignore the clear implication of § 10709(b), directing the commission to determining whether the carrier proposing a challenged rate has market dominance "over the transportation to which the rate applies."

it gives the statute only the meaning carried by the phrase "absence of effective competition" without any limitation whatever. There may be sound economic or administrative arguments for giving the Commission such free rein, but Congress simply did not do so. The Commission's studies showing that direct competition for a particular movement is not a sufficient economic test may indicate how much wiser Congress would have been had it allowed the Commission more latitude. Those studies and the Commission's recommendations may, indeed, persuade Congress to alter the statute. But the post-enactment economic studies tell us nothing about what the statute means.

In this part of the 4R Act, Congress did what courts have repeatedly criticized it for failing to do.⁷ It wrote clearly and succinctly. Indeed, the entire definition of market dominance is set forth in twenty words. Its brevity implies no ambiguity. When a statute is clear, it must be read to mean what it says. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 67, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748, 755 (1982); *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246, 252 (1981); *Howe v. Smith*, 452 U.S. 473, 483, 101 S.Ct. 2468, 2475, 698 L.Ed.2d 171, 180 (1981).

Administrative agencies are given latitude in interpreting statutes they execute.⁸ When the statute requires interpretation we defer to their expertise and responsibility.⁹ But when

⁷See, e.g., *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 133, 95 S.Ct. 335, 353, 42 L.Ed.2d 320, 347 (1974); *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 200, 72 S.Ct. 223, 225, 96 L.Ed. 225, 229 (1952); *United States v. Evans*, 333 U.S. 483, 484-85, 68 S.Ct. 634, 635, 92 L.Ed. 823, 825 (1952); *United States v. Mason*, 611 F.2d 49, 52 (4th Cir.1979); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 406 (D.C.Cir. 1976).

⁸*Batterton v. Francis*, 432 U.S. 416, 425, 97 S.Ct. 2399, 2405, 53 L.Ed.2d 448, 456 (1977); *Williams v. St. Clair*, 610 F.2d 1244, 1249 (5th Cir.1980).

⁹*Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625 (1965).

statutory words are plain, there is no reason to defer, for our competence and experience in statutory interpretation are surely greater. “[T]he courts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute . . . that are inconsistent with the statutory mandate . . .” *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37, 102 S.Ct. 38, 42, 70 L.Ed.2d 23, 33 (1981).

Our colleagues in the majority straddle the issue of interpretation. They do not read the statute either to require or to forbid the consideration of geographic competition. They simply defer to the Commission’s decision. This might be appropriate were the statute unclear. But deference has already been paid to the Commission’s 1976 reading of the statute to mean that the statute forbids such consideration. No court, including the majority, has found this interpretation to be in error. It is, I submit, not only permitted but compelled.

What the Interstate Commerce Commission has done is to perform a sleight-of-hand interpretation. It decided in 1981 that a statute permits it to consider evidence that, in a careful 1976 decision, it had read the self-same statute to preclude. The statute has not been amended. Nothing new has been discovered in its legislative history, and, despite the majority’s effort to find some hint of later congressional sanction in the Staggers Act, the Commission itself has, after relying on that history, said that the Staggers Act contains nothing that directly supports the change. What the Commission has said is simply that it has changed its mind: its earlier “interpretation was unnecessarily restrictive.”¹⁰ “[T]he thoroughness, validity, and consistency of an agency’s reasoning are factors that bear on the amount of deference to be given the agency’s ruling.” *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37, 102 S.Ct. 38, 44, 70 L.Ed.2d 23, 33 (1981). The

¹⁰Ex Parte 320 (Sub-No. 2), 365 ICC 128.

Commission has been neither thorough nor consistent here. See *General Electric Co. v. Gilbert*, 429 U.S. 125, 141, 97 S.Ct. 401, 411, 50 L.Ed.2d 343, 357 (1976) ("We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency"); *United Housing Foundation, Inc. v. Foreman*, 421 U.S. 837, 857-859, 95 S.Ct. 2051, 2063-64, 44 L.Ed.2d 621, 635-36 (1975); *Fort Worth & Denver Ry. Co. v. Lewis*, 693 F.2d 432 (5th Cir.1982) (adhering to agency's "original and contemporaneous construction" of the Act in question). Only a few weeks ago, we denied deference to an agency decision because the agency had, "in the guise of interpretation," effected "a change in statutory intent." *Quarles v. St. Clair*, 711 F.2d 691 (5th Cir.1983).

After adopting a practice and using it in actual operation, an administrative agency may properly change its course and decide that the practice is not feasible. Experience, the old saw correctly runs, is the best teacher. For this reason, we defer to agency judgments based on experience. In this caes, I would defer to a decision that the consideration of indirect competitive factors would not, as earlier thought by the Commission, unduly protract proceedings.¹¹ This is something that can be learned by experience. But the Commission has no greater experience in interpreting the statute now than it had in 1976. Indeed, it has had no experience with considering geographic or product competition as a factor in determining market dominance.

There is a "judicial — indeed, universally human — temptation to pass responsibility on to others by saying one is *describing* their will when one is, in truth, *prescribing* what is to be."¹² The Commission has attributed what it wills to a Congress that

¹¹Ex Parte 320 (Sub-No. 1), 353 ICC at 905.

¹²Tribe, Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence, 57 Indiana L.J. 515, 523 (1982) (emphasis in original).

never intended this result. The hand is masked as the hand of Congress but the voice that speaks is in truth the voice of the Commission.

Congress knows exactly how to deregulate an industry when it chooses to do so. It has effectively deregulated rate control of air transportation.¹³ In adopting the 4R Act, it did not intend to eliminate the regulation of maximum railroad rates but only to lessen regulation when "competition is actually sufficient to insure that rates will not exceed a reasonable level." Its aim was, as the majority agrees, to deregulate rates only in the areas in which effective competition exists. But Congress defined what it meant by effective competition: it is competition from other carriers for the traffic or movement to which a rate applies. Our guide most unerring is neither legislative history, a history that is uncertain, nor the definition of effective competition revised by a Commission bent now on its own goal, heedless both of congressional intent and of cost to shipper or consumer, but what Congress itself said.¹⁴

An agency that changes its course by rescinding a rule and adopting a contrary one "is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, ____ U.S. ___, ___, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443, 457 (1983). "[T]he forces of change do not always or necessarily point in the direction of deregulation." *Id.* The Commission has not explained or even attempted to explain why what was "explicit" in 1976 is no longer so, why what was an in-

¹³The Airline Deregulation Act of 1978, Pub.L. No. 95-504, 92 Stat. 1705 (1978), Pub.L. No. 96-192, § 28, 94 Stat. 48 (1980) (codified in scattered sections of 49 U.S.c.).

¹⁴See *Rubin v. United States*, 449 U.S. 424, 430, 101 St. Ct. 698, 701, 66 L.Ed.2d 633, 638 (1981); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 187, 98 S.Ct. 2279, 2298, 57 L.Ed.2d 117, 141 (1978).

dustry meaning five years before has suddenly changed, or why it has learned better how to read a statute in the interim. Even if it had discretion initially to interpret the statute, it has not "cogently explain[ed] why it has exercised its discretion in a given manner." (citations omitted). *Id.* at ___, 103 U.S. at 2869, 77 L.Ed.2d at 461. This failure ought to suffice for rejection of its change of heart. 4958.

For these reasons, I respectfully dissent from our abdication of our duty to interpret the laws of the United States and from the majority acceptance of a meaning that the statute cannot bear.

APPENDIX B

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Nos. 81-4257, 81-4259, 81-4277, 81-4299, 81-4334,
81-4347, 81-4354, 81-4357, 81-4365 to 81-4369, 81-4373,
81-4415, 81-4423 and 82-4021.

WESTERN COAL TRAFFIC LEAGUE
and its Members, Et al.,

Petitioners,

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

**Petitions for Review of an Order of the
Interstate Commerce Commission**

**ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC
(Opinion December 8, 1982, 5 Cir., 1982, ___ F.2d ___)**
(March 7, 1983)

Before CLARK, Chief Judge, BROWN, GEE, RUBIN, REAVLEY,
POLITZ, TATE, JOHNSON, WILLIAMS, JOLLY and
HIGGINBOTHAM, Circuit Judges.*

BY THE COURT:

A member of the court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

*Judges Carolyn Dineen Randall and Will Garwood did not participate in the consideration of this order.

IT IS ORDERED that these causes shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX C

**WESTERN COAL TRAFFIC LEAGUE
and its Members, et al., Petitioners,**

v.

**UNITED STATES of America and
Interstate Commerce Commission,
Respondents.**

Nos. 81-4257, 81-4259, 81-4277, 81-4299, 81-4334,
81-4347, 81-4354, 81-4357, 81-4365 to 81-4369, 81-4373,
81-4415, 81-4423 and 82-4021.

United States Court of Appeals,
Fifth Circuit.

Dec. 8, 1982.

Petitions for Review of Orders of the Interstate Commerce Commission.

Before BROWN, RUBIN and REAVLEY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The Railroad Revitalization and Regulatory Reform Act of 1976 (the 4R Act)¹ was designed to eliminate needless regulatory restraints on railroads and to prescribe rate-making practices that would both encourage effective competition and protect consumers.² As one of its measures to achieve this, Congress limited the authority of the Interstate Commerce Commission to suspend a railroad rate on the basis that it is unjustly or unreasonably high. The Commission now has no jurisdiction to

¹Pub.L. No. 94-210, 90 Stat. 31 (1976), to be incorporated into the U.S. Code as part of the Revised Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*

²Senate Conference Report No. 595, 94th Cong., 2d Sess. 134, reprinted at 1976 U.S.Code Cong. & Ad.News 14, 148, 1949.

review any rate unless it finds that the rail carrier defending the rate can exclude effective competition for the transportation to which the rate applies. The carrier's power to exclude such competition is called "market dominance."

The Commission has adopted what it terms guidelines, but considers to be regulations, for deciding whether a carrier has market dominance. Under the guidelines, the Commission may consider evidence that other carriers or modes of transportation compete for the same movement of the product to which the rate applies. Evidence is also admissible that transportation of substitute products (product competition) or transportation of the same product from other places (geographic competition) provides less direct, but potentially equally effective competition. When such evidence is considered, the number of rates immunized from regulation is increased.

Several organizations representing businesses and consumers that would be adversely affected by increases in various rail rates challenge the validity of the regulations on the ground that they exceed the Commission's statutory authority and on the further ground that the regulations do not comply with the Commission's statutory mandate to promulgate standards and procedures that facilitate market dominance determinations.

They also challenge other Commission decisions in the same regulations. The Commission has announced that user investments in rail-related facilities will not create a presumption of market dominance. Evidence of investments made in the future will not be admitted to show market dominance; evidence of past investments will be admitted but will create no presumption. In addition the Commission has abandoned the presumptions of market dominance formerly drawn from market share data and from cost/price ratios.

The Commission is joined in defending its actions by the Department of Justice and a number of intervenors including the Association of American Railroads and several railroad companies.

We conclude that the statute limits the definition of market dominance to transportation of the same product from the same origin to the same destination. The Commission's definition of market dominance is, therefore, invalid. Because the Commission must reconsider its definition, and must revise the standards and procedures adopted to implement it, any evaluation of those standards and procedures in their present form is unnecessary. We conclude, however, that the Commission did not exceed its statutory authority in adopting guidelines that describe the kind of evidence it will consider and the weight it will give such evidence.

I.

We preface the factual background with a review of established precepts. The administrative agency charged with executing a statute has primary responsibility for determining the scope of its authority.³ A reviewing court may not set aside the agency's interpretation of the statute that authorizes it to act merely because the judges would have interpreted the statutory language differently.⁴ When, pursuant to congressional mandate, an agency adopts regulations to implement the statute it is charged with administering, the agency's interpretation of the

³*Batterson v. Francis*, 432 U.S. 416, 425, 97 S.Ct. 2399, 2405, 53 L.Ed.2d 448, 456 (1977); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625 (1965); *Williams v. St. Clair*, 610 F.2d 1244, 1249 (5th Cir.1980); *Belenke v. SEC*, 606 F.2d 193, 197 (7th Cir.1979); *Atchison, T & S.F. Ry. Co. v. ICC*, 580 F.2d 623, 629 (D.C.Cir. 1978).

⁴*Herweg v. Ray*, ____ U.S. ___, ___, 102 S.Ct. 1059, 1067, 71 L.Ed.2d 137, 147-48 (1982); *Batterson v. Francis*, 432 U.S. at 425-26, 97 S.Ct. at 2405, 53 L.Ed.2d at 456-57; *Unemployment Comm'n of Territory of Alaska v. Aragon*, 329 U.S. 143, 153, 67 S.Ct. 245, 250, 91 L.Ed. 136 (1947); *American Telephone & Telegraph Co. v. United States*, 299 U.S. 232, 235-37, 57 S.Ct. 170, 172, 81 L.Ed. 142 (1936); *Mid-Louisiana Gas Co. v. Federal Energy Reg. Com'n*, 654 F.2d 530, 534 (5th Cir.1981).

statute is entitled to even greater weight.⁵ Such regulations can be set aside only if the agency has exceeded its statutory authority or if its regulations so far depart from the statutory purpose that they can be stigmatized as "arbitrary or capricious," or "an abuse of discretion," or "otherwise not in accordance with law."⁶

These terms are necessarily imprecise for they do not express a formula. When Congress has chosen an administrative agency to fulfill both executive and quasi-legislative functions, a court reviewing the agency's reading of the governing statute must take into account both the congressional grant of discretion to the agency and the agency's expertise. Judicial review is not to be exercised with the zeal of a pedantic schoolmaster who grades papers for a single correct answer, but with the respect that is due responsible and experienced government officials themselves charged with duties of national importance.

Nonetheless, a reviewing court has the duty to determine whether an agency has transgressed the bounds fixed by Congress,⁷ else both judicial review and the constitutional stricture that ultimate legislative power not be delegated would both be meaningless. "[C]ourts are not bound to accept the ad-

⁵ *Batterson v. Francis*, 432 U.S. at 425-26, 97 S.Ct. at 2405-06, 53 L.Ed.2d at 456-57; *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660, 36 L.Ed.2d 318, 329 (1973); *Pacific Coast Medical Enterprises v. Harris*, 633 F.2d 123, 131 (9th Cir. 1980).

⁶ 5 U.S.C. § 706(2)(A) (1976); *Batterson v. Francis*, 432 U.S. at 425-26, 97 S.Ct. at 2405-06, 53 L.Ed.2d at 457; *American Trucking Association, Inc. v. United States*, 642 F.2d 916, 920 (5th Cir. 1981); *Ami-Chance, Inc. v. United States*, 576 F.2d 320, 326 (Ct.Cl. 1978).

⁷ *Intern. Broth. of Teamsters, Etc. v. Daniel*, 439 U.S. 551, 566 n. 20, 99 S.Ct. 790, 800 n. 20, 58 L.Ed.2d 808, 820 n. 20 (1979); *Zuber v. Allen*, 396 U.S. 168, 193, 90 S.Ct. 314, 338, 24 L.Ed.2d 345, 360 (1969); *N.L.R.B. v. Brown*, 380 U.S. 278, 291, 85 S.Ct. 980, 988, 13 L.Ed.2d 839, 849 (1965).

ministrative construction of a statute regardless of consequences."⁸ While administrative agencies are expert in technical problems within their jurisdiction, they enjoy no special skill in statutory interpretation, an area in which courts are the final authority.⁹ For these reasons a court reviewing an agency's interpretation of its governing statute is not subject to the same constraints that apply when it reviews the procedures the agency adopts to fulfill its mandate.¹⁰

For almost a century railroad rates, unlike prices charged in most sectors of the American economy, have been stringently regulated. Tariff rates could be changed only after the long delay occasioned by administrative litigation and review under the substantive standards of the Interstate Commerce Act. In 1976 Congress found that, due in no small part to excessive regulation, railroad facilities had deteriorated, return on investment was far below the cost of capital, and a succession of major railroad bankruptcies had occurred.¹¹

At the same time, the central premise of maximum rate regulation, that the railroads had a transportation monopoly requiring control lest it become a monster, had itself become outdated. Although railroads dominated freight traffic in the United States when the Act was passed in 1887, railroads today carry only a third of intercity freight tonnage and compete in

⁸*Estate of Sanford v. Commissioner*, 308 U.S. 39, 52, 60 S.Ct. 51, 60, 84 L.Ed. 20, 27 (1939).

⁹*Fed. Elec. Com'n v. Dem. Senatorial Campaign Com.*, 454 U.S. 27, 31-32, 102 S.Ct. 38, 42, 70 L.Ed.2d 23, 29-30 (1981); *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 14, 88 S.Ct. 631, 658-59, 19 L.Ed.2d 787, 797 (1968) (Harian, J., dissenting), quoted in *Barlow v. Collins*, 397 U.S. 159, 166, 90 S.Ct. 832, 837, 25 L.Ed.2d 192, 199 (1970); 4 K. Davis, *Administrative Law Treatise* § 30.09 (2d ed. 1958).

¹⁰Compare *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Counsel*, 435 U.S. 519, 543-44, 98 S.Ct. 1197, 1211-12, 55 L.Ed.2d 460, 479 (1978).

¹¹*Senate Rep. No. 499*, 94th Cong., 2d Sess. pp. 2-3, reprinted at 1976 U.S.Code Cong. & Ad.News 14, 15-17.

such traffic with motor carriers, barges, pipelines, airlines, and other forms of transportation.¹² "[T]here are few significant commodities which are not practically susceptible to transportation by at least two competing modes of surface transportation[.]"¹³

Before 1976, all rail rates were required to be "just and reasonable."¹⁴ The Commission had authority to regulate any rates that did not meet this standard. In adopting the 4R Act, Congress sought to restore financial stability to the railroad industry by reducing regulatory restraints on railroad pricing decisions. The Act permits the Commission to consider whether a rate is reasonable only if the Commission first determines that the rail carrier has "market dominance *over the transportation to which [the] particular rate applies.*"¹⁵ "Market dominance" was originally defined as "an absence of effective competition from other carriers or modes of transportation *for the traffic or movement to which a rate applies.*"¹⁶ That language was subsequently revised, without substantive change, when the Interstate Commerce Act was recodified in 1978.¹⁷ In the 4R Act, Congress directed the Commission to establish, by rule, standards and procedures for making market dominance determinations.¹⁸

¹²*Id.*, reprinted at 1976 U.S. Code Cong. & Ad. News 16.

¹³Illinois Cent. Gulf R. — Acquisition — G., M. & O., et al., 338 I.C.C. 805, 836 (1971).

¹⁴Interstate Commerce Act, 49 U.S.C. § 1(5) (1976).

¹⁵49 U.S.C. § 10701a(b)(1) (Supp. IV 1980) (emphasis added).

¹⁶Pub.L. No. 94-210, § 202(b), 90 Stat. 31 (1976), codified at 49 U.S.C. § 1(5)(c) (1976) (emphasis added).

¹⁷Pub.L. No. 95-473, 92 Stat. 1337 (1978). It now reads "*transportation* to which the rate applies" instead of "*traffic or movement* to which [the] rate applies." 49 U.S.C.A. § 10709(a) (West Special Pamphlet 1982).

¹⁸The pertinent statutory language, set forth in the 4R Act, §202(b), codified at 49 U.S.C. § 1(5)(d) (1976), repealed by Pub.L.No. 95-473, § 4(b), (c), 92 Stat. 1337, 1466-70 (1978), was:

Within 240 days after the date of the enactment of this subdivision, the Commission shall establish, by rule, stand-

The Commission was instructed to solicit and consider the recommendations of the Attorney General and the Federal Trade Commission in establishing its rules.¹⁹ The Act requires the Commission to make a jurisdictional market dominance determination within 90 days after the beginning of proceedings challenging the level of rail rates.²⁰ The Staggers Act, adopted in 1980,²¹ adds a further limitation: the Commission shall find that the rail carrier establishing the challenged rate does not have market dominance unless the rate exceeds a stated revenue/variable cost ratio.²²

III.

Soon after passage of the 4R Act, the Commission adopted Ex Parte No. 320, introducing rebuttable presumptions of market dominance. The Commission presumed that a carrier had market dominance if (1) the carrier handled 70 percent or more of the traffic of goods involved within the prior year (the "market share" presumption); (2) the rail rate yielded revenues exceeding 160 percent of the railroad's variable cost of service (the "cost" presumption); or (3) the shipper had made a substantial investment in rail-related plant or equipment precluding the use of alternative transportation (the "substantial investment" presumption).²³ The "cost" and "substantial investment" presumptions were rebuttable through the introduction of any

ards and procedures for determining, in accordance with Section 15(9) of this part, whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rules shall be designed to provide for a practical determination without administrative delay.

¹⁹*Id.*

²⁰49 U.S.C.A. § 10709(b) (West Special Pamphlet 1982).

²¹Pub.L. No. 96-448, 94 Stat. 1895 (1980).

²²49 U.S.C.A. § 10709(d)(2) (West Special Pamphlet 1982).

²³Ex Parte No. 320, Special Proc. for Findings of Market Dominance, 353 I.C.C. 874, *modified*, 355 I.C.C. 42 (1976).

relevant evidence. The "market share" presumption could be rebutted only by evidence of direct carrier competition for the specific movement.

The Department of Justice, the Department of Transportation, and the railroads had urged that the definition of the relevant market should not be so confined but should extend more broadly to include product, geographic, and potential competition.²⁴ The Commission gave two reasons for rejecting that position. Such evidence would create complex anti-trust type litigation that could not be resolved within the 90-day statutory time limits²⁵ for making market dominance decisions. In addition, the Commission concluded that the statutory definition of market dominance precluded consideration of such competition.²⁶ The Commission also pointed out that, as experience was gained in the implementation of the concept of market dominance, refinements and modifications might be required. It would hold the proceedings open to permit reevaluation of the various standards and procedures, based on actual experience.²⁷

The Commission's regulations were upheld on judicial review, with the exception of a limited remand for purposes of clarifying the cost presumption. *Atchison, T. & S.F. Ry. v. ICC*, 580 F.2d 623 (D.C.Cir.1978). In that case, as here, a major issue before the Court concerned the Commission's treatment of geographic and product competition. The Department of Justice argued that the Commission erred in not permitting such evidence to be considered even to rebut the regulatory presumptions. In upholding the Commission's decision to exclude such evidence, the court found "sufficient basis in the statutory language and purpose to merit our deferral to the Commission's view."²⁸

²⁴353 I.C.C. at 900.

²⁵*Id.* at 905.

²⁶*Id.* at 904-05.

²⁷355 I.C.C. at 20.

²⁸580 F.2d at 634.

Commenting generally on the respective role of the Commission and the courts in implementing the market dominance regulations, the District of Columbia court stated:

Overall, the Court's role is one of deference and deferral. The Commission will be in a position to evaluate the regulations more fully in light of experience. That is an important feature of the administrative process. The courts remain open if the Commission is slothful or unwilling to undertake appropriate reconsideration and fine tuning in the light of experience.

580 F.2d at 623 (citations omitted).

In response to the court's remand for clarification of the cost presumption, the Commission issued a supplementary opinion.²⁹ In that opinion, the Commission noted that it was undertaking a further analysis of its market dominance definition that would, for example, "reveal how to treat evidence of geographic competition."³⁰ The Commission emphasized that it would look at all pertinent evidence and noted that, although certain kinds of competition are not relevant to computing market share, carriers could introduce evidence of geographic and product, as well as other, competition, to establish that effective competition exists.³¹

Ex Parte 320 (Sub-No. 1)

After several years of experience with the presumptions,³²

²⁹Ex Parte No. 320, Special Proc. for Findings of Market Dominance, 359 I.C.C. 735 (1979).

³⁰*Id.* at 735, n. 2 and accompanying text.

³¹*Id.* at 736, n. 7 and accompanying text.

³²Following the promulgation of Ex Parte No. 320, the ICC began to apply its market dominance rules in maximum rate reasonableness cases. The practical effect of the application of these standards, according to the ICC, was a substantial lessening in the number of rates over which the Commission exercised its regulatory jurisdiction.

and after completion of several studies,³³ the Commission pro-

See Implementation of the 4-R Act, Hearing Before the Sub-comm. on Surface Transp. of the Committee on Commerce, Science and Transp. of the United States Senate, S. Rep. No. 5, 96th Cong. 1st Sess. 46 (1979) (Statement of Hon. A. Daniel O'Neal). Chairman O'Neal noted that "between October, 1978 [the effective date of the market dominance rules] [sic] and December, 1978, the Commission precluded only 15 rate increases from taking effect out of several thousand filed and 267 protested [under what is now 49 U.S.C. § 10707]." *Id.* He went on:

This is in significant contrast to the period just before the enactment of the 4-R Act, when investigations and suspensions of rail rates ran at much higher levels. For example, in the first months of 1975, we suspended 75 rate schedules out of 170 protested. And if you translate that to a 2-year period, that would be 300 suspensions as opposed to 15 in the 2-year period after the act became effective.

Quite clearly, the market dominance concept [combined with procedural standards set forth in Section 202 of the 4R Act] have had a very great effect on rate and ratemaking where traffic is competitive. *Id.* at 58.

In 1979, A. Daniel O'Neal, then the I.C.C.'s Chairman, reported to Congress, "We believe our market dominance regulations are an accurate implementation of the policies embodied in the 4-R Act." *Id.* at 58. The Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce issued a report praising the Commission's implementation of the market dominance regulations. See Committee Print 96-I.F.C. 40 (February, 1980).

³³In a report to Congress (ICC, *The Impact of the 4R Act Railroad Ratemaking Provisions*, October 5, 1977), the Commission analyzed, among other things, the impact of its market dominance regulations. That report concluded that approximately 50 percent of rail traffic would be market-dominant under the Commission's presumptions, absent rebuttal evidence. *Report* at 51. Subsequently, the Commission staff directed a research project by a consultant to analyze the market dominance concept in operation. In a report issued in 1979, the consultants concluded, *inter alia*, that (1) because of the complexity of rail

posed in Ex Parte No. 320 (Sub-No. 1)³⁴ removal of all but the cost presumption. In lieu of the eliminated presumptions, the Commission proposed that parties present any relevant evidence, including evidence of geographic or product competition. While the Commission was considering comments in that proceeding, however, Congress enacted new legislation which required modification of that proposal.

The Staggers Act Amendment

In 1980, Congress amended the market dominance section by restricting the situations in which the Commission might find market dominance. Section 202 of the Staggers Act directs the Commission to make a finding that the carrier lacks market dominance if the carrier shows that the challenged rate would yield revenues less than a given percent of variable cost.³⁵ Contrary to the Commission's previous cost presumption, the amended statute provides that a finding that a rate is equal to or greater than the statutory variable cost percentage "does not establish a presumption" of market dominance.

The Challenged Decision:

1. Elimination of the Market Dominance Presumptions

Following passage of the Staggers Act, the Commission adopted the challenged regulations. The market dominance

markets, general procedural rules must permit exceptions in individual circumstances; (2) very little rail traffic (under 5% long term, 10-15% short term) is market dominant if all transportation alternatives are considered; and (3) rebuttable presumption tests tend to be inaccurate. A.T. Kearney Inc., *A Study to Perform an In-Depth Analysis of Market Dominance And its Relationship to Other Provisions of the 4R Act*, IX-4-6 (1979).

³⁴49 U.S.C.A. 10709(d)(2) (West Special Pamphlet 1982). The revenue/variable cost percentage threshold started at 160 percent in 1980 and increases each year, in five percent increments, to 180 percent in 1984.

³⁵Rail Market Dominance and Related Considerations, 45 Fed. Reg. 3353 (Proposed January 17, 1980).

presumptions have been eliminated and replaced with broader and more flexible guidelines. The primary reason for adopting the new approach is the Commission's conclusion that the presumptions do not necessarily reflect railroad market power and, therefore, yield inaccurate market dominance determinations.³⁶ The cost, market share, and substantial investment presumptions are found to be poor indicators of market dominance in the widely varying fact situations to which they must be applied. The new guidelines focus market dominance evidence on the transportation alternatives, if any, available to a shipper, and the feasibility of using each.³⁷

2. Cost Presumption

With respect specifically to elimination of the cost presumption, the Commission notes that the former presumption (*i.e.*, a rate exceeding 160 percent of variable cost establishes market dominance) is inconsistent with the Staggers Act.³⁸ That act

³⁶Ex Parte No. 320 (Sub-No. 2), Market Dominance Determinations, 365 I.C.C. 118, 120-21 (1981).

³⁷*Id.* at 131.

³⁸That act provides:

In making a determination under this section, the Commission shall find that the rail carrier establishing the challenged rate does not have market dominance over the transportation to which the rate applies if such rail carrier proves that the rate charged results in a revenue-variable cost percentage for such transportation that is less than —

- (A) 160 percent during the period beginning on the effective date of the Staggers Rail Act of 1980 and ending September 30, 1981;
- (B) 165 percent during the period beginning October 1, 1981, and ending September 30, 1982;
- (C) 170 percent during the period beginning October 1, 1982, and ending September 30, 1983;
- (D) 175 percent or the cost recovery percentage, whichever is less, during the period beginning October 1, 1983, and ending September 30, 1984; and

removes from Commission jurisdiction rates below a threshold figure set at 160 percent for 1980 and increasing annually to 180 percent in 1984. The Commission rejects suggestions that it adopt a higher ratio as a presumption of market dominance, noting that although price/cost ratios provide a convenient benchmark for deciding whether to look for market dominance (the role assigned by the jurisdictional provision of the Staggers Act), there are a number of reasons why a high price/cost ratio may not be indicative of true market power.

Ratios do not, for instance, tell us about the degree of market power possessed by the railroad, since they do not tell us whether a proposed rate will actually move traffic over an extended period of time. If the rate is high, shippers may find alternatives more attractive, forcing the rate back down again. Some may accept the high rate because of a preference for the carrier or because of a premium service associated with it. There are any number of reasons why a high price/cost ratio may not be indicative of true market power on the part of the railroad. Reliance on such ratios will, therefore, not only be misleading, but will preclude more relevant information from being introduced.³⁹

As an additional reason for eliminating the presumption, the Commission recites the difficulties in determining the variable costs of a rail movement.

(E) the cost recovery percentage, during each 12-month period beginning on October 1, 1984.

For purposes of subparagraphs (D) and (E) of this paragraph, the cost recovery percentage shall in no event be less than a revenue-variable cost percentage of 170 percent or more than a revenue-variable cost percentage of 180 percent.

49 U.S.C.A. § 10709(d)(2) (West Special Pamphlet 1982).

³⁹365 I.C.C. at 122.

Such costs depend on numerous factors that vary considerably from one movement to another. Since the simplicity of the cost test requires that a standard costing methodology be used, there is no way of avoiding the distorting inaccuracies of such a test. Many rates falling above a designated revenue-to-variable cost ratio would, on the basis of more accurate cost estimates, in fact be below it. Since more accurate cost information can, and very likely will, be presented as evidence, we think a price/cost presumption based on imperfect, though standard, cost estimates offers very little help.⁴⁰

3. Market Share Presumption

The Commission's reason for eliminating the market share presumption is the difficulty it has found in defining the scope of the market.⁴¹ The basic problem, the Commission points out, is that the factors determining the appropriate scope vary widely in individual situations. Moreover, the Commission asserts that even an accurate calculation of a carrier's share of a particular market reflects only the transportation alternatives selected in the past, as opposed to alternative sources currently available. The competitive implications of any given market share percentage, therefore, vary widely from case to case.

4. Substantial Investment Presumption

The Commission states that the substantial investment presumption was designed to protect shippers tied to a particular carrier by substantial rail-related investment.⁴² Its decision to eliminate the presumption is based on two considerations. First, the Commission has experienced difficulty in identifying pertinent elements of a shipper's investment in plant and

⁴⁰*Id.*

⁴¹*Id.* at 123.

⁴²*Id.* at 124.

equipment and in determining whether that investment makes use of another carrier or method impossible or impractical. Explaining its decision to eliminate the presumption, the Commission asserts that the "amount of rail-related investment is, by itself, a poor index of captivity."⁴³ As an example, it cites the purchase of coal cars, which may represent a new and substantial rail-related investment, yet not tie shippers to a particular railroad.

Second, the ability of shippers and carriers to enter into rail service contracts has reduced the importance of substantial investment in market dominance proceedings.⁴⁴ Shippers can now protect themselves, the Commission states, by negotiating with various carriers. When sufficient competition exists, carriers will have the incentive to offer contracts with reasonable terms.⁴⁵

The Commission adopts substantially the same policy with respect to long-term coal supply contracts, in which shippers tie themselves to particular carriers by negotiating long-term contracts with coal sources served by only one railroad.⁴⁶ The Commission has decided to place considerably less weight on the ex-

⁴³*Id.*

⁴⁴The Commission first liberalized contracting opportunities on its own initiative through the issuance of three notices in Ex Parte No. 358, Railroad Contract Rates, in 1978, 1979, and 1980. Ex Parte No. 358, Railroad Contract Rates, 45 Fed. Reg. 58189 (1978) (codified at 49 C.F.R. Part 1039); Ex Parte No. 358-F, Railroad Contract Rates, 45 Fed. Reg. 21719 (1980) (codified at 49 C.F.R. Part 1039). The policy announced in those proceedings was codified and clarified in Section 208 of the Staggers Act, 49 U.S.C. § 10713 (West Special Pamphlet 1982). Section 208(a) of the Staggers Act (49 U.S.C. § 10713) permits railroads and shippers to contract for rail transportation services. Contracts entered into under that section are exempt from all ICC regulation and the exclusive remedy for breach, as with any contract, is a court action. 49 U.S.C. 10713(i) (West Special Pamphlet 1982).

⁴⁵*Id.* at 125.

⁴⁶*Id.* at 126.

istence of long-term coal supply contracts executed after passage of the Staggers Act. It is concerned that shippers will not take advantage of opportunities to negotiate with carriers, but will rely instead on the old presumptions. In effect, the Commission has announced that it will not allow shippers to ensure its continuing jurisdiction over their rail transportation after October 1980 by tying themselves to a single carrier with substantial rail-related investments or long-term supply contracts.

5. Geographic and Product Competition

The Commission's guideline state that four major forms of competition affect rail transportation: (1) intramodal competition, *i.e.*, competition by railroads with railroads; (2) intermodal competition, *i.e.*, competition with railroads by other forms of transportation; (3) geographic competition; and (4) product competition.⁴⁷ Under each of these headings, the guidelines list representative factors relevant to the existence of competition.⁴⁸ The guidelines indicate that other forms of competition may also be important in individual circumstances and that the Commission is prepared to consider such evidence on a case-by-case basis.⁴⁹

Because of its prior position on the limited applicability of evidence concerning geographic and product competition, the Commission discusses at length its decision to include such evidence.⁵⁰ First, the Commission addresses its original interpretation of the statutory language and concludes that its reading was unnecessarily restrictive in focusing only on direct carrier competition and ignoring the indirect competition impact that geographic or product competition may have.⁵¹ The

⁴⁷*Id.* at 131.

⁴⁸*Id.* at 132-34.

⁴⁹*Id.* at 131.

⁵⁰*Id.* at 127-31.

⁵¹*Id.* at 128.

Commission finds nothing in the 4R Act or the Staggers Act that precludes revising its original restrictive interpretation.⁵²

In response to arguments that consideration of geographic and product competition is not possible within the time allotted, the Commission states that determining the presence or absence of effective geographic competition under the new guidelines should be manageable in most cases. Finally, the Commission addresses its previous concern that such evidence can not establish the existence of truly effective competition because geographic or product competition does not provide an immediate restraint on prices.⁵³ Although those forms of competition are less effective in restraining prices than a possible immediate loss of traffic, the Commission now recognizes the deterrent effect of a future loss of revenues on short-term market abuse.

In order to clarify the procedures for introducing evidence of market dominance, the Commission first notes that the railroad has the statutory obligation to present revenue/variable cost evidence if it seeks to demonstrate that the rate is below the statutory jurisdictional threshold. The railroad must also introduce evidence of product or geographic competition by identifying such competition. Once the railroad has made this identification, the party opposing the rate has the burden of proving that the product or geographic competition identified by the railroad is not effective.

Thus, the Commission's new guidelines reflect, in part, the positions urged originally by the agencies with statutory respon-

⁵²The Commission also found evidence that the Staggers Act suggested a more flexible interpretation. *Id.* at 129. This basis for change is now abandoned. Counsel for the Commission concedes that the Staggers Act contains nothing to support the change, while opposing any suggestion that it implies approval of the Commission's former interpretation.

⁵³*Id.* at 131.

sibility for advising it. After five years of experience with a more cautious approach, the Commission has found merit in the FTC's original criticism that use of presumptions as "shortcuts" obscures other considerations of relevance to the market dominance determinations.⁵⁴

IV.

The petitioners challenge the Commission's position that the statute gives it authority either to consider or not to consider evidence of geographic and product competition in determining market dominance. To evaluate this position, we first return to the statute. It refers to "effective competition . . . for the transportation to which a rate applies,"⁵⁵ not to competition *with* that transportation.

The statutory language must be read in the light of the manner in which the market dominance issue arises. When a shipper challenges a specific rate to transport a particular product from one place to another, the Commission has jurisdiction to review the reasonableness of the rate only because the rail carrier setting the rate has market dominance over that particular movement. Competition *for* a movement of coal by rail from a coal deposit in Wyoming to a utility company in Texas, for example, is created only if some other carrier is willing to move that product from the same origin to the same destination. The availability of coal moving by barge from a mine in Kentucky to the Texas utility (geographic competition) creates competition *with* the Wyoming-Texas movement but not competition *for* that movement. Similarly, suppliers of natural gas seeking to deliver it by pipeline to the utility may compete economically with the sellers of coal to supply an alternate energy source, but neither the natural gas producers nor the pipeline delivering their product compete *for the movement* to which the challenged rate applies.

⁵⁴See discussion in *Santa Fe, supra*, 580 F.2d at 630-31.

⁵⁵49 U.S.C.A. § 10709(a) (West Special Pamphlet 1982).

The congressional history does not indicate that the Commission was meant to consider geographic and product competition in determining whether a carrier has market dominance. The Senate Conference Report on the 4R Act merely states:

While the absence of effective competition test is not intended to strictly conform with the standards of the antitrust laws, it is intended that when the Commission administers the test *it will recognize the absence of forces which normally govern competitive markets.*" (Emphasis added.)

1976 U.S.Code Cong. & Ad.News 148, 163. Far from requiring the Commission to recognize the presence of product-geographic competition, this language mandates only that the Commission recognize the absence of competitive forces in the railroad industry.

The Staggers Act demonstrates that Congress knew the economic significance of product-geographic competition and referred specifically to those factors when it thought them appropriate. Section 205(a)(1) of the act requires the Commission to initiate a proceeding to determine whether, and to what extent, "product competition" (defined by the statute to include both what we have called product and geographic competition) should be considered in determining the reasonableness of rates. The instruction is not set forth in the U.S.Code but is contained in the historical note following 49 U.S.C.A. § 10701a (West Special Pamphlet 1982). Section 205(a) expressly recites that this shall not be construed as altering the meaning of the term "market dominance" as defined in 49 U.S.C. § 10709(a). Pub.L. No. 96-448, § 205(a)(3)(B), 94 Stat. 1905 (1980).⁵⁴

⁵⁴On May 14, 1981, the Commission issued a decision concluding that such competition would not be considered as a reasonableness issue. Ex Parte No. 320 (Sub-No. 2), Market Dominance Determinations, 363 I.C.C. 1 (1981), *petition for review filed sub nom. Association of American Railroads v. United States*, No. 81-2249 (D.C.Cir. filed Nov. 30, 1981), transferred, No. 82-4082 (5th Cir. Feb. 26,

The Commission's interpretation of the statute would read "effective competition . . . for the transportation to which a rate applies" to mean "effective competition *with* the transportation." There may be sound economic or administrative arguments for giving the Commission such free rein, but Congress simply did not do so. The Commission's studies showing that direct competition for a particular movement is not a sufficient economic test may indicate how much wiser Congress would have been had it allowed the Commission more latitude. Those studies and the Commission's recommendations may, indeed, persuade Congress to alter the statute. But the post-enactment economic studies tell us nothing about what the statute means.

While the Commission's original interpretation of the statute as excluding consideration of product-geographic competition is not decisive, it is not to be ignored. In deferring to the Commission's original interpretation, the District of Columbia Circuit commented "the construction may appear to some to attribute excessive significance to a terse statutory term." *Santa Fe, supra*, 580 F.2d at 634. The tentativeness of this endorsement does not constitute approval of a completely different reading. The statute is certainly brief: the entire definition of market dominance is set forth in twenty words. But brevity does not necessarily imply ambiguity. When a statute is clear we should read it to mean what it says, however succinctly.⁵⁷

We do not imply that, once the Commission makes a statutory interpretation, it is bound by a sort of agency stare decisis. Based on what the Commission learns from experience, new in-

1982), consolidated with No. 81-4257, motion to sever granted June 17, 1982.

⁵⁷*American Tobacco Co. v. Patterson*, ____ U.S. ___, ____ 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748, 755 (1982); *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246, 252 (1981); *Howe v. Smith*, 452 U.S. 473, 483, 101 S.Ct. 2468, 2475, 69 L.Ed.2d 171, 180 (1981).

formation, or new ideas, it may indeed alter its interpretations, overturn its administrative rulings, and adopt new practices. *American Trucking Associations, Inc. v. Atchison T. & S.F. Ry. Co.*, 387 U.S. 397, 416, 87 S.Ct. 1608, 1618, 18 L.Ed.2d 847, 860 (1967). Error is not to be perpetuated simply because it has been once made, and wisdom is not to be rejected merely because it comes late.

Here, however, there is no evidence the Commission has learned one iota more about the meaning of the statute or the direction of Congress than it knew five years ago. The Commission has merely altered its reading of what Congress directed a half-decade earlier because it considers that the new interpretation would produce more desirable results. This after-acquired wisdom cannot alter the statutory language and allow the Commission unfettered authority to define effective competition as it will.

V.

The petitioners also contend that the Commission's guidelines contravene the congressional directive in the 4R Act, that it establish, by rule, standards and procedures for determining . . . whether and when a carrier possesses market dominance . . . Such rules shall be designed to provide a practical determination without administrative delay.⁵⁸

Necessarily our determination will require the Commission to reconsider its standards and procedures. However, because some of the questions raised and fully briefed in this appeal must be considered by the Commission and may, therefore, recur, we now consider them.

The Commission, it is argued, has promulgated "guidelines" rather than "rules," and these do not establish standards or procedures that will permit a practical determination. It is of no

⁵⁸This language was repealed as executed in 1978. See *supra* note 18.

moment that, for reasons it has failed to articulate, the Commission has clad its promulgation in the cloak of guidelines rather than rules. The Administrative Procedure Act⁵⁹ defines a "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . ." The Commission followed the notice and comment procedures for rulemaking prescribed by the Administrative Procedure Act. 5 U.S.C. § 553 (1976). None of the petitioners challenges the fairness of the procedure or the Commission's compliance with the rulemaking procedures. Although the Commission's decision embodies statements of policy and interpretations, the Commission also clearly intended to announce a change in the method it would follow in making the market dominance determination, a determination affecting substantive rights.⁶⁰

In *American Trucking Associations, Inc. v. ICC*, 639 F.2d 452 (5th Cir.1981), we discussed the differences between guidelines and rules and the criteria to be applied in determining whether, in a given situation, the distinction is merely semantic. As we there held, the status of guidelines as "rules" is determined by their binding character.⁶¹ The Commission's guidelines describe the "obligations" of railroads and shippers (365 I.C.C. 131-32); direct shippers to "use these guidelines for preparation of rebuttal evidence" (*id.* at 132); and state that the Commission "will" give more or less weight to certain evidence (*id.* at 131) and "will" consider product and geographic competition

⁵⁹5 U.S.C. §551(4) (1976).

⁶⁰Cf. *American Bus Ass'n v. United States*, 627 F.2d 525 (D.C.Cir.1980).

⁶¹639 F.2d at 463. The fact that the Commission used the term "guidelines" is not controlling: it is the impact and not the phrasing that matters. Indeed, agencies often adopt policies having the status of rules without codifying them in regulations, guidelines or in other formal formats. See *Brown Exp., Inc. v. United States*, 607 F.2d 695 (5th Cir.1979).

evidence (*id.* at 135). In short, as in *American Trucking*, there are "sinews of command beneath the velvet words of the . . . guidelines." 659 F.2d at 463.⁶² The guidelines here involved are indeed rules by these criteria and the Commission's choice of nomenclature is without legal significance. Thus, the Commission's guidelines conform to the 4R Act's "rule" requirement.

Whether or not the Commission can feasibly make market dominance determinations within ninety days based on its guidelines is a matter for it to determine, at least in the first instance. Whatever the complexity of the issues before it in determining market dominance, the Commission is the best arbiter of its ability adequately to consider those factors within the time allowed. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-25, 98 S.Ct. 1197, 1202, 55 L.Ed.2d 460, 467-68 (1978). We decline to tell the Commission in advance of any experience that its procedures prevent it from reaching a decision within the time allowed it by statute.

Petitioners also attack the sufficiency of the guidelines to constitute "standards," as Congress commanded. They argue that the guidelines lack the definiteness and predictability of standards and, therefore, do not allow the Commission and parties to measure in a practical way whether there is effective competition in a particular situation. Because our decision requires the Commission to develop new rules that may be more or less explicit than the present ones, we need not now decide how precise administrative declarations of policy must be to con-

⁶²The *American Trucking* test primarily identifies "rules" by whether the agency *intends* them to control the course of its future proceedings. The language just quoted shows that the ICC did so intend. For example, the Commission could not refuse to consider product competition where proved, nor could it direct that the shipper bear the burden of proof to show that railroad rates were above the variable cost threshold in a particular case without repealing its guidelines through rulemaking procedures. See 365 I.C.C. at 131-132.

stitute standards. For the same reasons, we decline to rule on the argument that the guidelines do not lend themselves to the "practical determination" of market dominance exacted by Congress.

VI.

In addition to its decisions concerning product-geographic competition, the Commission's guidelines eliminate the presumption of market dominance flowing from substantial shipper investment in rail-related plant or equipment. Instead, the 1980 guidelines announce that evidence of substantial investment made prior to October 1, 1980 (the date of passage of the Staggers Act) can be introduced as "an evidentiary tool."⁶³ Investments made after that date will not be considered. The petitioners contend that this arbitrarily excludes evidence of post-October 1, 1980 investments, and is unreasonable even as to investments made before that date.

As to pre-October 1, 1980 investments, the Commission has merely removed the presumption, rebuttable even in its original formulation, that a carrier has market dominance when affected shippers or consignees "have made a substantial investment in rail-related equipment which prevents or makes impractical the use of another carrier or mode."⁶⁴ The Commission's reasons for doing so have already been noted. As to post-October 1, 1980, investments, the Commission reasons that "contracts afford adequate protection to shippers with substantial rail-related investment."⁶⁵ The Commission also deals with the argument "that such contracts encompass too short a period of time to cover the life of most rail-related investments."

For example, the Chemical Manufacturers Association indicated that, because of many uncertainties, railroads are generally reluctant to engage in long-

⁶³363 I.C.C. at 124.

⁶⁴363 I.C.C. at 123.

⁶⁵Id. at 124.

term contracts and that few of these contracts exceed 5 years. We do not deny that the protection afforded by a contract becomes less effective to the extent that the life of that contract is less than the life of the rail-related investment. However, we also emphasize that such problems are not beyond the control of the shipper. A long-term contract that protects the shipper for life of the investment should be available from a railroad who is encouraging that investment to be made, given the business that it means for the railroad. Furthermore, the historical failure of shippers to negotiate long-term contracts may, in part, have been due to the protection provided by the substantial investment presumption.

365 I.C.C. at 125.

Contrary to petitioners' assertion, the Commission is not forcing shippers who make substantial investments in rail-related equipment after the Staggers Act either to enter into a rail transportation contract or to forego maximum rate protection under the Interstate Commerce Act. Its decision encourages shippers to use whatever bargaining position they have to negotiate with carriers for transportation before making substantial investments. The Commission has professed a readiness to recognize the absence of transportation alternatives in particular situations and to afford those shippers adequate protection. This policy does not, on the face of it, seem arbitrary in an era where railroads and shippers are free to contract under the Interstate Commerce Act. To the extent that the Commission's guidelines encourage shippers with transportation alternatives to negotiate for transportation contracts, the guidelines are consistent with Congressional policy.⁶⁶

⁶⁶See H. Rep. No. 1430, 96th Cong., 2d Sess. 100, U.S. Code Cong. & Admin. News 1980, 3978, 4132 (1980) ("[T]he conferees intend to encourage shippers to contract")

Ultimate correctness, like truth, is difficult to ascertain. The Commission's reasons are plausible. Petitioners seek to demonstrate the untenability of the Commission's decision by argument rather than evidence. It is not our role to reassess the decision *de novo*, but only to reject it if it is arbitrary or capricious. Nothing in the record and nothing of which we might take judicial notice enables us to stigmatize that decision as willfully adopted, without support or reasonable explanation.

VII.

Finally, the petitioners protest elimination of the cost and market share presumptions of market dominance. Although the guidelines eliminate the presumptions, they do not arbitrarily exclude pertinent evidence. The Commission encourages the submission of evidence of "more accurate costing information which may include price-cost ratios and lead to more appropriate market determinations."⁶⁷ It also promises to consider evidence of current market shares and market share trends. The Commission's half-decade of experience with the presumptions equips it to decide whether the presumptions have accomplished their purpose. We lack the knowledge to evaluate the Commission's conclusions and the warrant to substitute our judgment. Certainly we cannot brand the conclusions arbitrary or capricious.

CONCLUSION

For these reasons, we hold that the Commission's rules allowing evidence of product and geographic competition to be considered in deciding whether a carrier has market dominance violates the limits contained in the statutory definition and is invalid. We express no opinion whether its "guidelines" are sufficient to be "standards" because they must be recast after new

⁶⁷365 I.C.C. at 122.

rules concerning market dominance are framed. We uphold the Commission's rules eliminating cost, market share, and substantial investment presumptions.

The petitioners invite us to provide interim rules for the Commission by reinstating its former guidelines. This we decline to do. The Commission itself is best equipped to decide how it will formulate regulations consistent with this opinion and what procedures it will adopt to handle its task in the interim.

The case is REMANDED for further proceedings consistent with this opinion.

JOHN R. BROWN, Circuit Judge, dissenting:

I dissent as to the Court's holding "that the Commission's rule allowing evidence of product and geographic competition in deciding whether a carrier has market dominance violates the limits contained in the statutory definition and is invalid," and to the reasons assigned to that result.¹

The Railroad Revitalization and Regulatory Reform Act of 1976" ("4R Act") constitutes a dramatic shift in government control of our nation's railroads, a shift "from reliance on government control to serve the public interest to reliance on market forces." Morton, *Contract Rates by Rail - A Tool in Ratemaking*, 49 I.C.C. Practitioners' Journal 413, 414 (1982). The 4R Act, as relevant here, restricted the I.C.C.'s jurisdiction over railroad rates to situations of "market dominance", but it left in the agency's lap the determination of appropriate standards and procedures relating to market dominance. The Commission, in Ex Parte No. 320, *Special Procedures for Making Findings of Market Dominance*, 353 I.C.C. 873, modified, 355 I.C.C. 12 (1976), adopted regulations to that end. It excluded geographic and product competition from the list of factors it would consider in making that jurisdictional determination.

¹I concur in all other holdings and the opinion's careful, exhaustive treatment of the background and development of the problem.

In the Staggers Rail Act of 1980, Congress reiterated its intent that the I.C.C. deregulate. Taking the hint, the I.C.C. abandoned market dominance presumptions and replaced them with broader, flexible guidelines. Reversing its prior position, it approved the consideration of geographic and product competition as factors indirectly relevant to determining competitive effect. The I.C.C., relying upon five years' experience with the original regulations, explained that its position had been too restrictive. Neither the 4R Act nor the Staggers Act, the I.C.C. stated, prevented such action.²

Any agency's freedom to change its mind, while neither guaranteed by the Constitution nor sanctioned by the Administrative Procedure Act, seems nonetheless a fundamental tenet in the effective and efficient administration of government. As times and business change, an agency may conclude that its policies should change as well. Prior policy, while not erroneous, simply no longer fits the bill. The Supreme Court has made that doubly clear as this Court recognized in *Aberdeen & Rockfish R. Co. v. United States*, 682 F.2d 1092 (5th Cir.1982):

[T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice
[T]his kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

²I do not question the Court's note 52 and related text.

American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway, 387 U.S. 397, 416, 87 S.Ct. 1608, 1618, 18 L.Ed.2d 847 (1967).

Indeed, as it must, the majority recognizes this. *Ante*, p ____ [slip op. p. 1488]. The I.C.C., prodded³ by Congress, made such a decision here. After a few year's experience in administering the 4R Act, it chose to amend its original stance on geographic and market dominance.

The case, as the Court puts it, comes down to the statutory terms limiting I.C.C. power to pass on rates to those in which the rail carrier has "market dominance over the transportation to which [the] particular rate applies, with "market dominance" being originally defined as "an absence of effective competition

³Congressional concern over the effectiveness of its actions and the response by the I.C.C. undoubtedly led to the hearing by the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce. Petitioners' brief points out:

See, *Implementation of the 4-R Act, Hearing Before the Sub-comm. on Surface Transp. of the Committee on Commerce, Science and Transp. of the United States Senate*, S. Rep. No. 96-5, 96th Cong. 1st Sess. 46 (1979) (Statement of Hon. A. Daniel O'Neal). Chairman O'Neal noted that "between October, 1978 [the effective date of the market dominance rules] [sic] and December, 1978, the Commission precluded only 15 rate increases from taking effect out of several thousand filed and 267 protested [under what is now 49 U.S.C. § 10707]." (*id.*) He went on:

This is in significant contrast to the period just before the enactment of the 4-R Act, when investigations and suspensions of rail rates ran at much higher levels. For example, in the first months of 1975, we suspended 75 rate schedules out of 170 protested. And if you translate that to a 2-year period, that would be 300 suspensions as opposed to 15 in the 2-year period after the act became effective.

Quite clearly, the market dominance concept [combined with procedural standards set forth in 4-R Act § 202] have

from other carriers or modes of transportation *for the traffic or movement to which a rate applies.*⁴

With stark simplicity, in the Court's approach it is a prepositional controversy whether it is competition *for* the transportation or competition *with* that transportation.⁵

This, in the words of the D.C. Circuit in its obviously reluctant, deferential approval of the I.C.C.'s order for not having credited the criticism of the Department of Justice and the F.T.C., "may appear to some as an attempt to attribute excessive significance to a terse statutory term." *Atchison, Topeka & Santa Fe Rwy. Co. v.-I.C.C.*, 580 F.2d 623, 634 (D.C.Cir.1978).

If the application of one, but not the other, of two simple words is the key to permissible response the Commission could make to relentless congressional pressure to successively relieve rail transportation from a half century of burdensome governmental control and leave it more and more to the regulatory competitive forces of the market place, it would certainly seem to me to be the situation in which considerable latitude had to

had a very great effect on rate and ratemaking where traffic is competitive. *Id.* at 58.

And the Subcommittee issued a report praising the Commission's implementations of the then market dominance regulations (see, Committee Print 96-I.F.C. 40 (February, 1980).)

However one slices it, the heat — Congressional heat, that is — was on.

⁴Pub.L. No. 94-210, § 202(b), 90 Stat. 31 (1976), codified at 49 U.S.C. § 1(5)(c) (1976) (emphasis added).

That language was subsequently revised, without substantive change, when the Interstate Commerce Act was recodified in 1978, Pub.L. No. 95-473, 92 Stat. 1337 (1978). The revised definitions, as currently set forth in 49 U.S.C. 10709(a) refers to "transportation to which the rate applies" in lieu of "*traffic or movement to which the rate applies.*"

⁵See Court's opinion at note 55 and related text. *Ante* at ____ [slip op. p. 1486].

be committed to the agency responsible for superintending the lessened regulation. This would include interpretation of the underlying statute. "The administrative interpretation of the Act by the enforcing agency is entitled to great deference." *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34, 91 S.Ct. 849, 854-55, 28 L.Ed.2d 158, 165 (1971).

It bears repeating what the Supreme Court said:

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings" . . . "Particularly is this respect due when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly when they are yet untried and new.

Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625, (1965) (citations omitted).

The Court says little about the reasons, or more significantly, the reasons stated by the Commission in changing its views. The Commission, however, supplied a reasoned basis for its present holding that the statutory definition, properly construed, does not automatically preclude considering such evidence:

We believe that [our prior] interpretation was unnecessarily restrictive. There is no evidence in the 4R Act that we consider only "direct" competition from other carriers or modes. Since the traffic to which the rate applies faces competition from other

sources or destinations of the same product or from substitute products *the carriers transporting that traffic face "indirect" competition from other carriers . . .*. "[E]ffective competition from other carriers or modes of transportation, for the traffic to which the rate applies" means that, if a carrier raises the rate for such traffic, then some or all of that traffic will be lost to other carriers or modes.

(emphasis added)

In disposing essentially of the "for" or "with" contention and in responding to contentions that consideration of product and geographic competition would not be attainable within the short time allotted, the Commission stated that with the new guidelines, determining the presence or absence of effective competition would be manageable. The I.C.C. described its conclusions and methods:

In general, geographic or product competition will be deemed to be present if it is established that alternative supplies of the same or a close substitute product exist and that carriers transporting these same or close substitute commodities from the various sources to the various destinations compete with one another for the traffic in question. Whether such competition is judged to be effective will depend on evidence concerning the substitutability of one supply source or destination for another or one product for another. If, in a particular case, the Commission finds that the evidence submitted is inconclusive, then such evidence will be given minimal weight in our determination of market dominance. We believe that this is an improvement over our 1976 position that evidence of geographic and product competition be always and automatically excluded from every proceeding.

We believe that this is an improvement over our 1976 position that evidence of geographic and prod-

uct competition be always and automatically excluded from every proceeding. [sic]

365 I.C.C. 130.

Both from the standpoint of Congressional awareness and revelations of the thinking of the I.C.C. the order under attack did not come as a bolt out of the blue. After Ex Parte No. 320, references began to appear in several Commission decisions indicating that product and geographic competition were relevant to the inquiry on market dominance.⁶

*The petitioner's brief advises us:

For example, in 1979, some two and a half years after its original decision in Ex Parte No. 320, the Commission stated in a footnote to a subsequent decision in the same proceeding that evidence of geographic and product competition should be admitted in market dominance proceedings. Ex Parte No. 320, 359 I.C.C. 735, 736 n. 7 (1979). This decision was issued in response to a remand from the D.C. Circuit seeking clarification on one aspect of the original decision. The footnote was unrelated to the purpose of the remand. The Commission also discussed geographic competition as being relevant to market dominance in two coal rate cases. In each of these cases the Commission found market dominance to exist, so no challenge was ever raised to its dicta concerning geographic competition. See Docket No. 37246, *Increased Rates on Coal, Midwestern Railroads, August, 1979*, (November 15, 1979) (unprinted); I. & S. No. 9199, *Unit Train Rates on Coal - Burlington Northern, Inc.*, 361 I.C.C. 651 (1979), remanded on other issues, *Iowa Public Service Co. v. Interstate Commerce Commission*, 643 F.2d 542 (8th Cir. 1981).

Also in Docket No. 37226, *Incentive Rates on Coal-Axial, Co. to Coleto Creek, Tx.* (January 15, 1980) ("Coleto Creek"), the Commission actually relied on evidence of geographic competition to make a finding of no market dominance. That decision was reversed and remanded by this Court in *Central Power & Light Co. v. United States*, 634 F.2d 137 (1980), supplemented on rehearing, 639 F.2d 1104 (1981), cert. denied, ____ U.S. ___, 102 S.Ct. 128, 70 L.Ed.2d 108 (1982).

And even more to the point was the Commission's decision on remand from the D.C. Circuit's decision in Santa Fe:

We will look at all pertinent evidence in arriving at a decision; see 353 I.C.C. 874 at 928.*

*There has been some misunderstanding on this point. While certain evidence is not germane to computing market share, proponents of a rate *may introduce evidence* of potential competition from private carriage, *alternative product competition or geographic competition* to show that effective competition exists.

Ex Parte No. 320, *supra*, 359 I.C.C. at 736.

Whatever influence these expressions might have had on Congress the most reasonable interpretation of the legislative history of the Staggers Act is that Congress was aware that the Commission was itself reexamining the geographic and product competition issue and determined not to decide the issue legislatively, but to leave the matter to the Commission. That interpretation is supported by the Conference Commission Report:

[S]ince other parts of the Conference substitute provide additional rate freedom for rail carriers beyond those found in present law or under existing or proposed Commission regulations, the Commission must revise its market dominance regulations. In maintaining the term market dominance, in addition to statutory changes designed to provide more rate freedom to rail carriers, the conferees intend that whenever *there is effective competition*, such competition should continue to function as the regulator of the rate rather than the Commission. Maintenance of the "market dominance" standard is *not intended in any way to restrict the ability of the Commission to apply this concept*, both in its regulations and individual cases.

H.Rep. No. 96-1430, 96th Cong.2d Sess. 83-89 (1980), U.S.Code Cong. & Admin. News 1980, 4120 (emphasis added).

Finally, rescuing the Court's example (notes 55-56 and related text *Ante* ____ [slip op. p. 1486-1487]) from the stricture of "for" and "with", the idea of geographic competition makes economic sense to this untutored, and if so, the Commission with its half century experience could concur. For example, a Chicago coal purchaser might have two alternate sources of supply: Southern Illinois and Wyoming coal being a fungible commodity the Chicago purchaser has no preference between the two. The Wyoming producer must compete with the Illinois rival, and transportation costs figure in his calculations. The carrier, if it hopes to secure the Wyoming business, must and will take the alternative into account — a pure case of geographic competition within a market.

The Court, embracing all of the standards by which all are bound on the scope of judicial review, nevertheless reaches a conclusion which trespasses on the domain reserved to the I.C.C. The result overrides the considerable deference due the Commission in its interpretation of the statute in the light of its experience and the meaning of the terms in the practical complex world of transportation.

There are areas "where angels fear to tread." This is one for judges.

APPENDIX D**EX PARTE No. 320 (SUB-No. 2)****MARKET DOMINANCE DETERMINATIONS AND
CONSIDERATION OF PRODUCT COMPETITION***Decided June 24, 1981***AGENCY:** Interstate Commerce Commission.**ACTION:** Notice of decision.**SUMMARY:** After notice (45 F.R. 83342) and comment the Commission has determined to discontinue its market dominance presumptions and replace them with evidentiary guidelines. Evidence of geographic and product competition has been found relevant to the determination of market dominance. Elsewhere in the Federal Register today, we are removing the existing market dominance rules at 49 CFR 1109.1.**EFFECTIVE DATE:** Thirty days from date of publication in the Federal Register.**FOR FURTHER INFORMATION CONTACT:**

Richard Felder or Frank Gianfrancesco
(202) 275-7656 (202) 275-7383

SUPPLEMENTAL INFORMATION:

Before the Commission may examine the reasonableness of a railroad freight rate, it must make a determination that the carrier proposing the rate holds a position of market dominance in supplying the transportation to which the rate applies. This requirement originated in the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act)¹ and was continued with

¹Public Law 94-210, 90 Stat. 31.

some modification in the Staggers Rail Act of 1980 (Staggers Act).²

Regulations to implement the 4R Act provided that rebuttable presumptions of market dominance would arise in specified circumstances.³ We have now undertaken a reexamination of this use of presumptions in the determination of market dominance. Our notice instituting the present proceeding (45 F.R. 83342) announced our intent to eliminate the rebuttable presumptions of market dominance based on cost, market share and substantial investment.⁴ We also indicated our intention to eliminate a corollary of the substantial investment presumption which is based on the existence of long-term supply contracts. Finally, we announced that we would retain the more limited rate bureau presumption and consider the issue under the new rules restricting rate bureau involvement in ratemaking. We proposed to replace these presumptions or tests with broader and more flexible guidelines. Such an approach would allow for more accurate market dominance determinations on a case-by-case basis.

The Staggers Act now precludes our jurisdiction over the maximum reasonable level of rates unless the rate exceeds a given price/cost ratio and the carrier has market dominance over the transportation. The proponent carrier has the burden of proving the rate below the jurisdictional threshold. If a rate is determined to be above that threshold, the qualitative⁵ issues of

²Public Law 96-448, 94 Stat. 1895.

³49 CFR 1109.1.

⁴In an earlier notice, Ex Parte No. 320 (Sub-No. 1), *Rail Market Dominance and Related Considerations*, 45 F.R. 83302, we had also proposed removal of the existing presumptions but for the cost test. Passage of the Staggers Rail Act of 1980 required modification of that proposal.

⁵By qualitative investigation we mean one based on a variety of qualitative and quantitative evidence separate from the price/cost jurisdictional threshold test, and not dependent on predetermined statistical measures.

market dominance must still be resolved and the burden is on the shipper to do so.

We have decided to discontinue the use of rebuttable presumptions as a tool to develop this qualitative evidence and to replace them with general guidelines. These guidelines are set forth below. Before the guidelines are presented, we will clarify our reasons for eliminating the existing presumptions. Further, we have decided to continue to include geographic and product competition as evidentiary tools in market dominance determinations. A separate section is devoted to discussion of this issue.

Our decisions are framed in light of the comments received in response to the December 11, 1980 notice. All comments have been read and studied, even though not all of them are discussed here.

Procedural issues. — A number of the parties have filed motions.

The Allied Chemical Company filed a motion to terminate and rescind this proceeding. Other parties, such as the National Council of Farmers Co-operatives and Kimberly Clark Corporation have included similar motions in their statements. Basically, their arguments are that section 205 of the Staggers Act precludes the use of product competition as a criterion for judging market dominance and that the removal of the presumptions will leave the parties without the guidelines they are entitled to by section 202(b) of the 4R Act. Allied also argues that no information received in Ex Parte No. 320 (Sub-No. 1) may be used in the current proceeding and that the possibility of contract rates is insufficient reason for discontinuing the substantial investment rebuttable presumption.

The parties' reasoning is unconvincing. As we note in our decision, that Congress directed the Commission, when determining market dominance, not to consider section 205 of the Staggers Act, does not prevent the Commission from modifying its in-

terpetation. Our decision replaces the rebuttable presumptions with evidentiary criteria; therefore, the parties are not left without guidelines. Further, we have not based this decision on information from Ex Parte No. 320 (Sub-No. 1). Our determinations have been based on the record in this proceeding. Finally, as we state in our decision, we believe shippers should be able to protect their long-term investments and supply contracts with contracts for rail transportation.

Consumer Owned Power Interests assert that we must issue an energy impact statement before we can revise our rules for market dominance. They are incorrect. Nothing in our revised rules will inhibit the transportation of coal. A market dominance finding is only an initial step in determining whether a rate is reasonable. Given this country's need for competitive sources of energy, rules for taking that initial step will not affect the movement of coal. Moreover, the rules we are promulgating allow truly captive shippers every opportunity to demonstrate their status. Railroads will not be able to abuse a monopoly position. We see no need, therefore, for an energy impact statement.

Elimination of Rebuttable Presumptions

Time has shown that the use of rebuttable presumptions has not enhanced the accuracy of market dominance determinations. While they did serve a useful purpose while we gained experience, the factors determining the degree of competition faced by a rail carrier are too numerous and too varied to be gauged, with any reasonable degree of accuracy, by so few measures. Further the measures themselves are often only approximations of the underlying conditions they are intended to reflect. For these reasons, the use of rebuttable presumptions in market dominance determinations often placed too much emphasis on quantitative evidence which did not fully reflect the circumstances of any given movement. This quantitative evidence was frequently offered at the expense of other evidence which,

though less subject to quantification, is more reflective of the degree of market power possessed by a rail carrier over certain traffic.

The comments of some of the participants, especially the railroads, in this proceeding indicate a basic agreement with these concerns. The Department of Transportation argued that the presumptions are "excessively restrictive" and that guidelines for submitting evidence would be more appropriate. Inland Steel agreed that the presumptions should be eliminated because they "are not universally suitable" and that cases should be treated individually. A much larger number of participants, however, opposed our proposal to discontinue the use of presumptions.

The Department of Energy and the Chemical Manufacturers Association, for example, argued that presumptions are necessary to expedite the review of cases and that this need is even more pronounced given the short-time period (90 days) allotted for such purposes. We agree that it is of benefit to all parties, including the Commission, that rate cases be reviewed as quickly and economically as possible. With appropriate guidelines as to what may be considered relevant evidence of market dominance, more accurate determinations can be made within the 90-day time period. Other participants, such as the Chlorine Institute, argued that rebuttable presumptions are useful in that they allow shippers to determine easily whether it is worthwhile to file a complaint. While this may be true to the extent the presumptions are inaccurate indicators of the presence or absence of market dominance, they may encourage rate complaints that should not be brought before the Commission and may discourage others that should. Finally, flexibility is necessary because of substantial differences among cases that preclude simple universally applicable rules. The use of presumptions has not facilitated proof of market dominance, to any great extent. Rather, presumptions have served, as a practical matter, to focus the issues. Once the rail carrier offered

evidence tending to challenge the presumption, more case-specific shipper evidence was required to obtain a market dominance finding.

1. *The cost test.*

A rebuttable presumption of market dominance will arise where the rate in issue exceeds the variable cost of providing the service by 60 percent or more.

As explained in the notice, the existing cost presumption is at odds with the rate threshold created by new section 10701a of the Staggers Act. The statutory threshold begins at 160 percent in 1980 and increases in increments to 180 percent after September 30, 1984. Rates below the threshold are now conclusively removed from our jurisdiction. For rates above the threshold, there is an open question as to market dominance. Under the cost presumption, there was an open question as to market dominance for rates below 160 percent of variable cost while rates above that level were presumed to reflect market dominance unless rebutted by more accurate cost evidence or other evidence to show effective competition. This old standard is, thus, clearly at odds with the Staggers Act.

The National Industrial Traffic League argued that, while the 160-percent cost test is inappropriate, it can be replaced with a higher revenue-to-variable cost ratio that is consonant with the jurisdictional thresholds established by the Staggers Act. While possible, it would be consistent with our other reasons for eliminating this presumption.

Rail Form A shares common problems with any standard methodology for estimating the variable costs of a rail movement. Such costs depend on numerous factors that vary considerably from one movement to another. Since the simplicity of the cost test requires that a standard costing methodology be used, there is no way of avoiding the distorting inaccuracies of such a test. Many rates falling above a designated revenue-to-variable cost ratio would, on the basis of more accurate cost estimates, in fact be below it. Since more accurate cost informa-

tion can, and very likely will, be presented as evidence, we think a price/cost presumption based on imperfect, though standard, cost estimates offers very little help.

Price cost ratios do provide a convenient benchmark for deciding whether to look for market dominance — and this is the role they are assigned by the jurisdictional provisions of the Staggers Act. But we question whether, even if calculated on the basis of accurate cost information, they reliably indicate the presence or absence of market dominance. Ratios do not, for instance, tell us about the degree of market power possessed by the railroad, since they do not tell us whether a proposed rate will actually move traffic over an extended period of time. If the rate is high, shippers may find alternatives more attractive, forcing the rate back down again. Some may accept the high rate because of a preference for the carrier or because of a premium service associated with it. There are any number of reasons why a high price/cost ratio may not be indicative of true market power on the part of the railroad. Reliance on such ratios will, therefore, not only be misleading; but will preclude more relevant information from being introduced. The guidelines established here will encourage submission of more accurate costing information which may include price-cost ratios and lead to more appropriate market dominance determinations.

2. Market share test.

A rebuttable presumption of market dominance will arise where the proponent carrier has handled 70 percent or more of the involved traffic or movement during the preceding year; the market share of the proponent will be deemed to include the share of any affiliates, and of any carriers with whom the proponent carrier has discussed, considered, or approved the rate in issue.

As we discussed in the notice, there are formidable difficulties associated with both the accurate calculation of a market share percentage and the interpretation of such a percentage in relation to market dominance. Such problems make impractical the use of market share information in the form of a rebuttable presumption. Many of the participants in this proceeding have

protested the elimination of the market share presumption. However, most of these did so by relying on the unconvincing argument that it has been used in the past. Some participants, such as DuPont and the Chemical Manufacturers Association, have contested our position that the calculation of the market share percentage is too complex.

To calculate accurately a market share percentage for the proponent carrier in a rate case, one must first determine the appropriate scope of the market. Since the purpose of a market dominance proceeding is to determine the degree of competition that the proponent carrier faces in regard to the movement in question, the appropriate scope of a market must be compatible with all movements of traffic that directly or indirectly exert competitive pressures on the challenged rate. The factors that determine the appropriate scope of a market vary widely from one case to another. This problem precludes any formula for market share determination which is both practicable and serviceable.

Another drawback of the market share presumption is that the competitive implications of any given market share percentage, even if accurately calculated, also vary widely from case to case. For example, the market share percentage does not measure the substitutability of one carrier or mode for another. Substitutability, which is what market share is primarily intended to measure, can be more accurately determined with a combination of evidence, both quantitative and qualitative. In short, observed market share percentages are more indicative of what transportation alternatives have been selected in the past as opposed to what alternatives are currently available.

We, therefore, conclude that use of market share information in the form of a rebuttable presumption detracts from the accuracy of market dominance determinations and, as a consequence, we have decided to eliminate the market share test. Evidence of current market shares and market share trends may, of course, be submitted in addition to or in conjunction with evidence suggested in the guidelines.

3. *Substantial investment/long-term supply contracts.* —
a. *The substantial investment test.*

A rebuttable presumption of market dominance will arise where affected shippers or consignees have made a substantial investment in rail related equipment which prevents or makes impractical the use of another carrier or mode.

As indicated in the notice, this presumption was designed to protect shippers who make themselves captive to a particular carrier as a result of making substantial rail-related investment. We presented two reasons for our proposal to eliminate this presumption. First, it is very difficult to isolate pertinent elements of a shipper's investment in plant and equipment and to determine whether that investment makes the use of another carrier or mode impossible or impractical. Second, liberalizing the Commission's policy regarding contracts between shippers and carriers has reduced the importance of substantial investment in market dominance proceedings. This liberalization was achieved by the Commission on its own initiative through the issuance of three notices in Ex Parte No. 358, *Railroad Contract Rates*, in 1978, 1979, and 1980. More importantly, the policy enunciated in these proceedings was codified and clarified in section 208 of the Staggers Act (49 U.S.C. 10713). For these reasons, we proposed to remove substantial investment as a presumption and to consider it as an evidentiary tool only for investments made prior to February 21, 1980, the date of the last Ex Parte No. 358 notice.

Few of the participants in this proceeding supported the elimination of the substantial investment presumption. One of these, the Department of Transportation, underscored the limited usefulness of this presumption by pointing out that it has not been used very much in the past (only 3 out of 117 cases in 1979).

The overwhelming majority of participants, however, opposed removal of this presumption. We believe, however, that the amount of rail-related investment is, by itself, a poor index of captivity. The type of investment and a variety of other factors

can be of major or even overriding importance in many situations. For example, coal cars purchased by the shipper may represent new and substantial rail-related investment, yet not tie the shipper to a particular railroad. This problem precludes any method, that is both serviceable and practicable, for quantifying substantial investment and, as a consequence, makes impractical the use of such evidence in a rebuttable presumption. The main thrust of the objections concerned the soundness of the argument that contracts afford adequate protection to shippers with substantial rail-related investment. Some of the participants (e.g., the Chemical Manufacturers Association, Western Coal Traffic League, and the National Industrial Traffic League) argued that contracts do not afford protection to shippers who have already made substantial rail-related investments. In other words, such shippers would have little or no leverage in negotiating a favorable contract. This argument may be correct, but is inapposite to the reason for the substantial investment presumption in the first place. The presumption was designed to protect shippers that have transportation alternatives but lose these alternatives once a rail-related investment is made. Essentially, the presumption protected shippers from potential adverse consequences of their own business decisions, in an era when shippers could not negotiate contracts with the railroad simultaneously with their investment in rail-related facilities. Now that contracts are available for this purpose, the presumption is superfluous where sufficient transportation competition exists and the shipper can protect itself by negotiating with the various carriers and then obtaining a contract reflecting the agreed upon terms. It is our belief that when sufficient competition exists, carriers will have the incentive to offer to shippers contracts containing reasonable terms. We understand that contracts would afford little protection to shippers who would be captive irrespective of substantial investment in rail-related facilities. For these shippers, however, the existence of such investment and, therefore, our argument regarding contracts would be irrelevant considerations in a market

dominance determination. These shippers would be able to prove market dominance on the basis of other evidence regarding transportation alternatives.

The second argument advanced by participants questioning the protection afforded by contracts is that such contracts encompass too short a period of time to cover the life of most rail-related investments. For example, the Chemical Manufacturers Association indicated that, because of many uncertainties, railroads are generally reluctant to engage in long-term contracts and that few of these contracts exceed 5 years. We do not deny that the protection afforded by a contract becomes less effective to the extent that the life of that contract is less than the life of the rail-related investment. However, we also emphasize that such problems are not beyond the control of the shipper. A long-term contract that protects the shipper for the life of the investment should be available from a railroad who is encouraging that investment to be made, given the business that it means for the railroad. Furthermore, the historical failure of shippers to negotiate long-term contracts may, in part, have been due to the protection provided by the substantial investment presumption.

Many of the participants protested the February 21, 1980 cut-off date for investments that would continue to be given consideration in market dominance proceedings. In our notice, we said:

With regard to investment made subsequent to our February 21, 1980 policy statement, we do not think that a shipper should be able to invoke our jurisdiction merely because it has made a bad business decision — that is, an investment decision by which it in effect binds itself to rail service without taking advantage of the contractual protection it could have secured.

While we retain these views, we do not believe that the February 21, 1980 date is inappropriate, and that the appropriate cut-off date is the effective date of the Staggers Act. We recognize that, notwithstanding our several policy statements, considerable uncertainty remained in the minds of shippers and carriers

about the validity of contracts entered into between them. Once the matter became the subject of congressional debate, the uncertainty heightened. Only with enactment of the Staggers Act could contracts be entered into without any doubt as to their legality and method of enforcement. Therefore, we have decided to replace the February 21, 1980 date with October 1, 1980.

b. *Long-term supply contracts.* — The notice also addressed long-term supply contracts. Some utilities have argued that long-term coal supply contracts legally or economically preclude them from using coal from alternative sources and, as a consequence, they are captive to a particular railroad. In the notice, we emphasized that we will not make findings that a shipper is captive solely because it has entered into a long-term supply contract. While we indicated that we would consider the existence of such contracts in market dominance proceedings, we also noted that we would place considerably less weight on such evidence for coal supply contracts executed after October 1, 1980, for the same reasons discussed immediately above. While we recognize that they are not easy to negotiate, transportation contracts can now, in our view, protect shippers who wish to secure long-term supplies of coal. Coal supply contracts made after the above date should be made contingent upon a satisfactory transportation contract.

Some of the participants in the proceeding argued that coal supply and transportation contracts cannot be made simultaneously in many instances. They contend that when the construction of a new public utility is involved supply contracts are made years in advance of the actual shipment of coal. Railroads, they argue, are reluctant to engage in transportation contracts for traffic that will not begin to move until the future. While this argument may have some merit in some circumstances, we nevertheless do not find it credible that a shipper who is planning to ship many thousands of tons of coal over many years, and can get that coal from several sources, will not

find railroads ready and willing to compete for their transportation contracts. Supplier-carrier combinations could be played off against one another until the most acceptable contractual terms were reached with both. Indeed, the shipper's negotiations with the railroad may well strengthen its hand in bargaining with the supplier. As with substantial rail-related investment, this argument does not apply to shippers who would be captive irrespective of long-term supply contracts. Such shippers should be able to prove market dominance on the basis of other evidence.

In sum, we do not find compelling reasons to alter our position regarding long-term supply contracts.

4. Rate bureau test.

In any proceeding involving a determination as to market dominance where the evidence adduced establishes that the rate at issue has been discussed, considered, or approved under a rate bureau agreement filed with the Commission, pursuant to section 5a or 5b of the Interstate Commerce Act, a rebuttable presumption will arise that a carrier participating in the rate or, in such discussion, or consideration does not provide effective competition to the proponent rail carrier for the involved traffic or movement.

As indicated in the notice, this test was never intended to be a presumption of market dominance but rather an evidentiary tool. We expressed our intention to continue considering such evidence in market dominance proceedings as long as rate bureau involvement in ratemaking continues. We also noted that section 219 of the Staggers Act gives the Commission authority (after April 1, 1982) to curtail rate bureau activity. Our intention would be to change even this limited rate bureau presumption to reflect any changes made in regulations governing rate bureau operations.

This proposal was not contested by the participants in this proceeding.

Geographic and Product Competition

The December 11, 1980 notice also responded to the question posed in section 205 of the Staggers Act, as to whether we

should consider product competition in determining whether rates are unreasonably high. Section 205 of the act defines product competition such that it encompasses geographic competition as well. We did the same in the notice, and in the notice voiced the tentative conclusions not to consider product and geographic competition in rate reasonableness proceedings, but to consider both of them, for purposes of gauging effective competition, in market dominance determinations.

On May 18, 1981, we issued a decision concluding that product and geographic competition would not be considered as a reasonableness issue. Thus, we must now decide whether to continue to include geographic and product competition as evidentiary tools in market dominance proceedings. We find that we should. Geographic and product competition serve as effective constraints on the abuse of market power by a rail carrier. Therefore, they are relevant factors to be considered in determining whether a carrier is market dominant vis-a-vis certain traffic. Not to consider such factors may, in many instances, result in inaccurate determinations of market dominance.

Most of the participants in this proceeding objected to the inclusion of geographic and product competition as evidence. Their comments were almost entirely based on the Commission's own reasons for not considering geographic and product competition in the original rules developed in Ex Parte No. 320; *Special Proc. for Findings of Market Dominance*, 353 I.C.C. 874 (1976). While the Commission indicated in 359 I.C.C. 736, footnote 7 (1979) its intention to include geographic and product competition as evidence in a market dominance determination, it never explained this in reference to its 1976 position. Because we would like to make this decision as complete as possible, we think it appropriate to examine the reasons for our earlier position on this issue.

In Ex Parte No. 320, the Commission dismissed geographic and product competition for use in calculating the market share presumption or its rebuttal. Geographic competition is a restraint

on rail pricing stemming from a shipper's or receiver's ability to get the product to which the rate applies from another source, or ship it to another destination. Because the shippers and receivers can do this, the railroad must compete with the railroad serving the alternate source or destination. Product competition occurs when a receiver or shipper can use a substitute(s) for the product covered by the rail rate. In that case, the railroad must compete with the railroad or other mode who carries that other product, and again, must keep its rate competitive if it wants the traffic.

In its original market dominance proceeding, the Commission found first that the law itself excludes consideration of geographic or product competition. To support this view the Commission cited section 202(c)(i) of the 4R Act:

market dominance refers to an absence of effective competition, from other carriers or modes of transportation, for the traffic or movement to which a rate applies.

The Commission's interpretation of this passage was that the only sources of competition to be considered in market dominance proceedings are other carriers transporting the same commodity between the origin and destination to which the challenged rate applies.

We believe that this interpretation was unnecessarily restrictive. There is no evidence in the 4R Act that Congress intended that we consider only "direct" competition from other carriers or modes. Since "the traffic to which the rate applies" faces competition from other sources or destinations of the same product or from substitute products, the carriers transporting that traffic face "indirect" competition from other carriers. To demonstrate this point, consider the following example. Assume that a shipper at point A can buy a desired product from two alternative sources, B and C. These sources are served by different carriers. Carrier X transports the product from B to A and carrier Y transports the product from C to A. How much the shipper will buy from each source depends, in part, on the

cost of transportation from each source. Now assume that carrier Y raises the rate it charges the shipper. Since source C is now relatively less attractive to the shipper than source B, carrier Y will lose traffic and carrier X will gain traffic as a consequence of Y's action. The fact that carrier X indirectly competes for carrier Y's traffic, and vice versa, serves as a constraint on the ability of either carrier to raise rates. "[E]ffective competition from other carriers or modes of transportation, for the traffic to which a rate applies" means that, if a carrier raises the rate for such traffic, then some or all of that traffic will be lost to other carriers or modes. We strongly believe that the example of geographic competition given above is appropriately encompassed by Congress' language.

Congress did not explicitly include or exclude geographic and product competition from its definition of market dominance. The definition, as contained in section 202(c)(i) of the 4R Act, was left unchanged by the Staggers Act. This definition, however, has a range of possible interpretations which Congress left to the Commission to fix exactly. Although the Commission's earlier interpretation of the definition of market dominance was restrictive, we believe that Congress, in the Staggers Act, intended a much more flexible interpretation. We base this view, in part, on language in the Conference Committee Report on section 201:

In maintaining the term market dominance, in addition to statutory changes designed to provide more rate freedom to rail carriers, the Conference intended that whenever there is effective competition which will restrain rate increases by the railroads, such competition should continue to function as the regulator of the rate rather than the Commission.

Effective competition for a firm providing a good or service means that there must be pressures on that firm to perform up to standards and at reasonable prices, or lose desirable business. Depending on the nature of the good or service, sources of competitive pressure may be of several different forms. For example, effective competition for "the traffic or movement to which a rate applies" can arise from: (1) carriers or modes of transpor-

tation serving the same origin/destination pair as that for the disputed rate, (2) carriers or modes of transportation delivering the same product from the same origin to alternative destinations, (3) carriers or modes of transportation delivering the same product to the same destination from alternative origins, and (4) carriers or modes of transportation delivering substitute products to the same destination, irrespective of origin.

We do not contend that all these sources of competition are equally effective in every circumstance. The effectiveness of each depends on the specific circumstances involved and this cannot be determined until each case is investigated. We believe that to exclude from consideration *a priori* any potential source of competition would be contrary to the intent of Congress as expressed in the Staggers Act, and would be bound to lead to inaccurate findings of market dominance.

A related contention of many of the participants in this proceeding is that subsection 205 3(B) of the Staggers Act precludes the Commission from considering geographic and product competition in market dominance determinations. As indicated above, section 205 concerns the use of product (and geographic) competition to determine the reasonableness of rail rates. Subsection 205 3(B) reads as follows:

Nothing in this subsection shall be construed as altering the meaning, use, or interpretation by the Commission, the courts or any party of the term 'market dominance,' as defined in section 10709(a) of title 49, United States Code. The enactment of this subsection shall not be considered by the Commission in any proceeding or by any court on an appeal from that or any other proceeding, to determine the proper scope of the term 'market dominance' over the transportation to which any particular rate applies.

This statement precludes the Commission from construing any part of section 205 of the Staggers Act as a directive for altering its interpretation of the definition of market dominance. It in no way precludes the Commission, on its own initiative, from altering its interpretation. The legislative history on section 205 makes this quite clear.

A second argument offered in the original market dominance proceeding was that it is not possible to make accurate findings of the absence or presence of product or geographic competition in the time allotted. We no longer believe that it is appropriate to assume, prior to any investigation, that this problem would exist in every case. With appropriate guidelines for submitting evidence, determining the presence of effective geographic or product competition should be manageable in most cases. The guidelines provided below indicate what types of evidence the Commission believes that it needs to ascertain, within the time limits, the presence or absence of effective geographic or product competition.

In general, geographic or product competition will be deemed to be present if it is established that alternative supplies of the same or a close substitute product exist and that carriers transporting these same or close substitute commodities from the various sources to the various destinations compete with one another for the traffic in question. Whether such competition is judged to be effective will depend on evidence concerning the substitutability of one supply source or destination for another or one product for another. If, in a particular case, the Commission finds that the evidence submitted is inconclusive, then such evidence will be given minimal weight in our determination of market dominance. We believe that this is an improvement over our 1976 position that evidence of geographic and product competition be always and automatically excluded from every proceeding.

The third reason put forward by the Commission for excluding evidence of product or geographic competition was that only immediate loss of traffic would constitute evidence of truly effective competition, and that geographic or product competition would not provide such immediate constraints. Geographic and product competition can do limit rates to reasonable levels despite the inability of shippers to switch to alternative sources or products immediately. Though less effective than an

immediate loss of traffic, a future loss of traffic is nonetheless harmful to a rail carrier. If the loss in future revenues exceeds the gains from exercising market power in the short term, then a rail carrier will be deterred from charging excessive rates.

In sum, we believe that geographic and product competition are encompassed by the definition of market dominance as presented in section 202 of the 4R Act. Further, a more flexible interpretation of this definition is consistent with the intent of Congress as expressed in relevant sections of the Staggers Act. Finally, problems associated with evaluating evidence pertaining to geographic and product competition should be mitigated by the guidelines established for submitting such evidence.

Guidelines for Submitting Evidence

In this section, we establish guidelines to assist shippers and carriers in compiling evidence pertaining to the presence or absence of effective competition for the traffic to which a challenged rate applies. We emphasize that it need not be demonstrated that transportation alternatives, other than the one in question, have actually been used in the past. Since there is a tendency to use the best alternative for a particular time and place and under given circumstances, such information is of little use for purposes of gauging the presence or absence of competitive pressures. In general, evidence should reflect the number of available alternatives and the feasibility of using each. The guidelines address the four major forms of competition that affect rail transportation: (1) intramodal competition; (2) intermodal competition; (3) geographic competition; and (4) product competition. Other forms of competition may also be of importance depending on individual circumstances. Since we cannot anticipate every possible form of competition, we must forego general guidelines for evidence pertaining to forms of competition that are more case-specific. However, we are nonetheless open to such evidence and will give it due consideration.

Prior to setting out the substantive guidelines, it is appropriate to review the respective obligations of carriers and protestants/complainants in submitting the relevant evidence. The carrier has two new obligations. First, if it wishes to avoid jurisdiction based on the applicable revenue/variable cost ratio, it has the burden of proof and therefore, of coming forward with convincing evidence. The protestant/complainant may respond to this evidence and the carrier may reply. If the carrier fails to raise this issue, we will proceed to an analysis of the qualitative factors. Second, if the railroad seeks a finding of no market dominance based on product or geographic competition it must identify where it believes such competition exists. Once the railroad has made this identification, the shipper has the burden of proving that the product or geographic competition identified by the railroad is not effective. Obviously, if these allegations are made in the context of a proposed rate, the quality of the evidence will be less than in a complaint proceeding in which more time is available. However, motions to dismiss an investigation and suspension or investigation proceeding based on newly developed evidence may be filed.

Aside from the new obligation to respond to (rebut) railroad claims in these two areas, protestants/complainants basically have the same burdens as before — that is, the burden of proving a lack of effective competition. Sections (1)-(4) below indicate the type of evidence we consider important. Protestants/complainants should also use these guidelines for preparation of rebuttal evidence.

1. *Intramodal competition.* — Intramodal competition refers to competition between two or more railroads transporting the same commodity between the same origin and destination. A shipper has rail alternatives when, for a given purpose, it can be served by more than one railroad or combination of different railroads. The degree to which these alternatives compete with one another depends on such factors as:

- (1) the number of rail alternatives;
- (2) the feasibility of each alternative as evidenced by:
 - (a) physical characteristics of the route associated with each alternative that are indicative of the feasibility of using that alternative for the traffic in question (e.g., circuity, track conditions, et cetera); and
 - (b) the direct access of both the shipper and the receiver to each of the rail alternatives as evidenced by individual rail sidings, neutral terminal companies or reciprocal switching; or, if direct access is not available, then the feasibility of using local trucking to transport the commodity to or from terminals;
- (3) the transportation costs associated with each alternative (to determine if actual use or alternatives is due to excessive rates charged by the rail carrier in question);
- (4) collective ratemaking among the railroads in question as evidenced by rate bureau involvement; and
- (5) evidence of substantial rail-related investment or long-term supply contracts (more weight will be given these contracts if made prior to October 1, 1980).

These factors should be considered in connection with the preparation and submission of evidence pertaining to the presence or absence of effective intramodal competition. This list is neither exhaustive nor mandatory but provides a general indication of the type of evidence that would be appropriate.

2. *Intermodal competition.* — Intermodal competition refers to competition between rail carriers and other modes for the transportation of a particular product between the same origin and destination. Motor and water carriage are the main sources of intermodal competition for railroads.

a. *Water carriage.* — Water carriage is restricted to certain geographic areas and is generally used for commodities moving in bulk. The evidence required to demonstrate effective competition between rail and water alternatives is in many respects similar to that required for intramodal competition among rail carriers. Parties in a rate case should provide evidence along the following lines:

- (1) the number of alternatives involving different carriers;
- (2) the feasibility of each alternative as evidenced by:

- (a) pertinent physical characteristics, for the product in question, of the transportation or routing associated with each alternative;
- (b) the access of both the shipper and receiver to each alternative; and
- (4) the transportation costs of each alternative.

Again, these factors are not exhaustive.

b. *Motor carriage.* — Unlike rail or water alternatives, the availability of many motor carrier alternatives for transportation services between two points can, in most instances, be taken for granted. Therefore, the feasibility of using motor carriage as an alternative to rail may be viewed as depending exclusively on the nature of the product and the needs for the shipper or receiver. Effective competition from motor carriage may be deduced from the following types of evidence:

- (1) the amount of the product in question that is transported by motor carrier where rail alternatives are available;
- (2) the amount of the product that is transported by motor carrier under transportation circumstances (e.g., shipment size and distance) similar to rail;
- (3) the amount of the product that is transported using motor carrier by shippers with similar needs (distributional, inventory, et cetera) as the shipper protesting the rate;
- (4) physical characteristics of the product in question that may preclude transportation by motor carrier; and
- (5) the transportation costs of the rail and motor carrier alternatives.

Other types of evidence on the feasibility or nonfeasibility of motor carriage as an alternative to rail will also be considered.

3. *Geographic competition.* — Geographic competition was described and defined above. Geographic competition among rail carriers is nontrivial for commodities in which transportation costs account for a substantial portion of the delivered price. To establish the potential for geographic competition, evidence should be submitted concerning the following:

- (1) the number of alternative geographical sources of supply or alternative destinations available to the shipper or receiver for the product in question;
- (2) the number of these alternative sources or destinations served by different carriers; and

(3) that the product available from each source or required by each destination is the same.

Such evidence is sufficient only to indicate whether effective geographic competition is possible. To determine whether effective geographic competition actually exists, evidence showing the feasibility of each source or destination and the likelihood of competition should be presented. This evidence may be as follows:

- (4) the distance associated with each alternative source or destination;
- (5) relevant physical characteristics of the route associated with each alternative;
- (6) the access of the shipper or receiver to each transportation alternative;
- (7) the capacity of each source to supply the product in question or the capacity of each destination to absorb the product in question;
- (8) the transportation costs associated with each alternative;
- (9) collective ratemaking among the railroads in question as evidenced by rate bureaus; and
- (10) evidence of substantial rail-related investment or long-term supply contracts (more weight will be given these contracts if made prior to October 1, 1980).

We again emphasize that these guidelines are not intended to encompass all pertinent evidence.

4. *Product competition.* — Product competition was also described and defined earlier. Evidence as to its existence should reflect the availability to the shipper or receiver of feasible substitutes and show that these substitutes can be obtained through the use of other carriers or modes without substantially greater cost, transportation or otherwise. To demonstrate whether a feasible substitute exists, the following types of evidence, among others, may be submitted:

- (1) use of a substitute product(s) by the receiver or shipper in question or by others with similar needs and under similar conditions;
- (2) the prices of the substitute product(s) relative to the product in question;
- (3) the efficiency of the substitute product(s) relative to the product in question; and

(4) the explicit and implicit transportation costs of the substitute product(s) and the product in question.

Again, these factors are not exhaustive.

These lists of factors concerning submission of evidence replace rebuttable presumptions in market dominance proceedings. We anticipate more accurate market dominance determinations because of the greater flexibility afforded by this approach. The substitution of these guidelines for presumptions should not significantly increase the burden of these proceedings on shippers, carriers or the Commission.

Conclusions

We have established guidelines for the submission of evidence in market dominance proceedings. Evidence of product and geographic competition will be considered in these deliberations. At the same time, by separate notice, we have eliminated the rebuttable presumptions and related procedures for making findings of market dominance as promulgated in Ex Parte No. 320, *Special Proc. for Findings of Market Dominance*, 353 I.C.C. 874 (1976) and 353 I.C.C. 12 (1976) [sic].

This decision will not significantly affect either the quality of the human environment, the conservation of energy resources, or small business.

Authority: 49 U.S.C. 10709, 10321, section 205, Public Law 96-448, 5 U.S.C. 553.

By the Commission, Acting Chairman Alexis, Commissioners Gresham, Clapp, Trantum, and Gilliam.

AGATHA L. MERGENOVICH.
Secretary

(Seal)

APPENDIX E

INTERSTATE COMMERCE COMMISSION

DECISION

EX PARTE No. 320 RAIL MARKET DOMINANCE

EX PARTE No. 320 (Sub-No. 2) MARKET DOMINANCE DETERMINATIONS AND CONSIDERATION OF PRODUCT COMPETITION

Decided: August 4, 1981

In Ex Parte No. 320, *Rail Market Dominance*, 365 I.C.C. 116 and Ex Parte No. 320 (Sub-No. 2), *Market Dominance Determinations*, 365 I.C.C. 118, to be effective August 7, 1981,¹ we determined that the market dominance regulations and presumptions found at 49 CFR 1109.1 would be discontinued and replaced with evidentiary guidelines. Evidence of geographic and product competition was found relevant to a determination of market dominance. The National Industrial Traffic League, the Chlorine Institute, Inc., Carolina Power & Light Company² and the American Paper Institute, Inc. have filed petitions requesting that the Commission stay the effective date of the decisions pending administrative review. The Western Coal Traffic

¹The decisions were served on July 8, 1981. Due to inadvertence both documents were published in the Federal Register before service to the parties. The effective date of the notice of decision and the removal of existing rules, therefore, has been extended to thirty days from the date of service, rather than the date of publication in the Federal Register. See, FR p. 36145, Tuesday, July 14, 1981.

²This petition also embraces Duke Power Company, South Carolina Electric & Gas Company and Virginia Electric and Power Company.

League,³ Central Illinois Light Company,⁴ Consumer Owned Power Interests, the Committee on Transportation and Distribution of the Society of the Plastics Industry, Inc., Kerr-McGee Corporation,⁵ the Chemical Manufacturers Association,⁶ and the National Coal Association⁷ have filed petitions requesting that the Commission stay the effective date of the decisions pending judicial review. The Railroads have replied to the petitions for administrative stay.

In determining whether to stay our decision, the relevant criteria are (1) whether petitioner has a substantial likelihood of prevailing on the merits; (2) whether the petitioner will be irreparably injured absent a stay; (3) whether a stay will harm other parties interested in the proceeding; and (4) whether a stay will interfere with the public interest; *Washington Metropolitan*

³Western Coal Traffic League v. United States of America, et al., Nos. 81-4257 and 81-4259 (5th Circuit).

⁴This petition also embraces the Middle South Utilities System, Potomac Electric Power Company, Public Service Company of Indiana, Inc., and South Carolina Public Service Authority. Petitioners have filed a petition for judicial review in the United States Court of Appeals for the Fifth Circuit. *Arkansas-Missouri Power Company, et al. v. United States of America and Interstate Commerce Commission*, No. 81-4277 (5th Circuit).

⁵This petition also embraces Gulf States Utilities Company, Iowa Power & Light Company, Oklahoma Gas & Electric Company, and Southwestern Electric Power Company.

⁶The Chemical Manufacturers Association moved, on July 20, 1981, to intervene in the Fifth Circuit appeal filed by petitioner Western Coal Traffic League, note 3, *supra*.

⁷The National Coal Association moved, on July 13, 1981, to intervene in the Fifth Circuit appeal filed by petitioner Western Coal Traffic League, note 3, *supra*.

Petitions for stay pending judicial review, filed by the Chlorine Institute, Inc., on July 30, 1981 and the Edison Electric Institute on July 31, 1981 have been rejected as late filed pursuant to 49 CFR 1100.98(e) which states that such petitions shall be filed not less than 10 days prior to the date the terms of the action take effect.

Area Transit Comm. v. Holiday Tours, 559 F.2d 841, 842-43 (D.C. Cir. 1977), *Canal Authority of State of Florida v. Calloway*, 489 F.2d 567, 572-73 (5th Cir. 1974); *Virginia Petroleum Jobbers Ass'n. v. Federal Power Comm'n.*, 259 F.2d 921, 925 (D.C. Cir. 1958).

Likelihood of Success on the Merits

Petitioners challenge the lawfulness of the Commission's July 8 decisions and the rescinding of the market dominance regulations on various grounds. Although the ultimate validity of our decisions will not be determined here, we believe that petitioners have not demonstrated a likelihood of success on the merits.

First, it is contended that the evidentiary guidelines will vastly increase the burden on both carriers and shippers in the determination of market dominance, without increasing the accuracy of market dominance determinations. The Commission's approach is characterized as a "scattershot" listing of factors which will encourage speculation and surmise regarding market dominance. This approach, it is argued, is inconsistent with the requirement of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act) that market dominance rules provide for a "practical determination without administrative delay," and that market dominance be a determination of the existence of effective competition.

We do not believe that our evidentiary guidelines will increase the burden on carriers and shippers. We do believe that our guidelines will increase the reliability of market dominance determinations. As we stated in Ex Parte No. 320 (Sub-No. 2), time has not shown that the use of rebuttable presumptions has enhanced the accuracy of market dominance determinations. To ensure accuracy, we need to add to those quantitative factors used to gauge competition other qualitative factors more indicative of the degree of market power possessed by a rail carrier over certain traffic. Contrary to petitioners' assertions, our guidelines do not encourage speculation and surmise. Indeed,

they provide far more detailed guidance than the former presumptions and thus represent an opportunity for parties to submit any and all relevant evidence necessary for us to ascertain accurately the existence of market dominance. Moreover, by replacing the regulations with evidentiary guidelines we do not believe that administrative delay will occur. Instead, with appropriate guidelines identifying what would constitute relevant evidence of market dominance, more accurate determinations can be made within the 90-day time period within which certain of these determinations must be made.

Petitioners also argue that pursuant to Section 202 of the 4R Act the Commission is clearly required to establish "rules" in accordance with the Administrative Procedure Act. The promulgation of incomplete "guidelines," petitioners suggest, does not conform with this statutory requirement. We disagree. As we pointed out in our decision (see discussion, 365 I.C.C. at 129-30), we believe that Congress, in the Staggers Act, intended a much more flexible interpretation of market dominance than we have previously accorded. Consequently, we believe our evidentiary guidelines will facilitate this Congressional intent. More importantly, our decision to rescind the presumptions and promulgate new guidelines was also based on our reexamination of the original 4R Act language and rationale in light of our experience with the presumptions (see discussion, 365 I.C.C. at 128-29). While the 4R Act required us to establish rules, which we did, it did not prohibit us from rescinding them. For these reasons, we reject this argument.

Petitioners next contend that consideration of product and geographic competition is not permitted by 49 U.S.C. §10709(a) which defines market dominance as "the absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies." In addition, it is suggested that considerations of product competition, to the extent contemplated by the July 8 decision, will involve the Commission in questions far beyond its area of expertise.

Our decisions of July 8 rejected the narrow interpretation petitioners give §10709(a). We explained that geographic and product competition serve as effective constraints on the abuse of market power by a rail carrier. Consequently, they are pertinent factors to be considered in gauging whether a carrier exercises market dominance over certain traffic. To ignore these factors would, in many instances, result in inaccurate determinations of market dominance. We also explained that our previous interpretation of §10709(a) was merely one within a range of possible interpretations which Congress left to the Commission to fix exactly. Geographic and product competition were neither excluded nor included by Congress from its definition of market dominance. For reasons which will not be repeated here, we found that our adoption of a more complete analysis was crucial to our proper exercise of jurisdiction under the Act, as amended. Product and geographic competition affect the competitive environment in which the rail carrier establishes its rates.

With respect to the contention that considerations of product competition will involve the Commission in questions exceeding its expertise, which is unwarranted under the statutory scheme, we believe that Congress has indicated the opposite to be true. Section 205(a)(1) of the Staggers Act directed the Commission to commence a proceeding for the purposes of determining whether, and to what extent, product competition should be considered in proceedings to determine the reasonableness of rail carrier rates. In that instance rather than prohibit the Commission, because of lack of expertise, from determining the consideration to be accorded product competition, Congress specifically provided that such a determination be made by the Commission. As contemplated by the instant decisions, Commission consideration of product competition does not differ substantially from that which would be exercised if we had decided to do so in a reasonableness context. We cannot agree, therefore, that our consideration of product competition, as contemplated by our July 8 decisions, will allow us to tread in

areas other than those in which Congress has previously evidenced its approval of our involvement.

It is argued that our non-retention of the market share presumption is arbitrary and capricious. Rather than eliminate the presumption, it is suggested that problems encountered in defining the scope of the market could be ameliorated through more precise definition of how the market share is to be calculated. We disagree. As we explained in the July 8 decision, there are substantial problems associated with both the accurate calculation of a market share percentage and the import of such a percentage in relation to market dominance. These difficulties make impractical the use of market share information in the form of a rebuttable presumption. Accurate calculation of a market share percentage necessitates ascertaining the appropriate scope of the market. The factors that determine the appropriate scope of a market vary widely from one case to another. This problem, we found, bars any uniform formula for market share determination which is both practicable and serviceable. Similarly, we found the presumption inadequate because the competitive implications of any given market share percentage, even if accurately calculated, vary widely from case to case. Considering these factors, we believe our new guidelines provide a far more useful and reliable method for determining the railroads' market power in a given situation.

Petitioners contend that the Commission was incorrect, arbitrary, and capricious in eliminating the substantial investment presumption. In addition, petitioners question the Commission's determination that investments made after October 1, 1980 are irrelevant in ascertaining whether a shipper is tied to the use of rail. As we indicated in our July 8 decision, this presumption was designed to protect shippers who make themselves captive to a particular carrier as a consequence of making substantial rail-related investment. We proposed its elimination because of difficulties encountered in identification of pertinent elements of a shipper's investment and because of the effect of a

more liberal Commission contract policy (and subsequent codification thereof in the Staggers Act) on shipper-carrier contracts. Petitioners object to the significance accorded shipper-carrier contracts by our decisions. They aver that since contracts are merely an alternative for shippers, the Commission placed undue emphasis on their importance. For reasons specified in our decision, we did base our decision, in part, upon considerations of newly found contractual freedoms for carriers and shippers. We did, however, also premise our decision upon considerations of pertinent investment identification. While petitioners attempt to show why they would prevail because of our contractual reasoning, they fail whatsoever to address this other basis of our reasoning. For this reason alone we do not believe petitioners would prevail on this argument.

Petitioners final argument addresses the Commission's determination that gives "considerably less weight" to long-term supply contracts signed after October 1, 1980. Petitioners maintain that, in effect, the Commission's action requires shippers entering into long-term supply contracts to sign transportation contracts with rail carriers for similar lengths of time. Such a posture, it is asserted, ignores the plethora of factors that might affect the duration of a transportation contract. We explained in the July 8 decision that we were placing less weight on evidence of long-term supply contracts for reasons similar to those supporting our substantial investment presumption revisions. In this instance, particularly, we are convinced that shippers are not deprived of the Interstate Commerce Act's protections. We have only lessened the significance of long-term supply contracts entered into subsequent to the effective date of the Staggers Act to make clear that shippers cannot rely on such post-Staggers Act contracts alone to establish market dominance. In such situations, as we pointed out (365 I.C.C. at 126), shippers who would be captive irrespective of long-term supply contracts should be able to establish market dominance on the basis of other evidence.

Irreparable Injury to Petitioner Versus Harm to Other Parties

In support of its allegation of irreparable injury absent a stay pending administrative review, petitioners essentially argue that because of the replacement of market dominance presumptions with evidentiary guidelines, and with the inclusion of evidence of geographic and product competition, shippers will be subject to unreasonably high, and therefore unlawful, rail rates. In addition, petitioners fear that all remedies available to them under the Interstate Commerce Act will be foreclosed.

Before the Commission may adjudicate the reasonableness of a rail rate, it must find that a carrier has market dominance. A Commission finding that a carrier does not have market dominance is determinative unless that finding is changed or set aside by a court of competent jurisdiction. Further, if the Commission has previously found that a carrier does not have market dominance over the transportation to which a proposed rate increase applies, the Commission may suspend the increase only if it specifically changes or sets aside its prior determination of market dominance. Consequently, when the Commission makes a finding, in accordance with its market dominance guidelines, that market dominance does not exist, a proceeding with respect to rate reasonableness is terminated. There remains for such a shipper no means under the Interstate Commerce Act to challenge the reasonableness of the rate. In essence, petitioners believe that to the extent our decisions render it more difficult for shippers to make a showing of a carrier's market dominance over the movement of certain traffic, shippers will be irreparably injured since they are precluded from pursuing remedies under the Interstate Commerce Act.

This argument must fail if only because petitioners have not shown that they will not be able to prove market dominance under the new guidelines. In any event, unless we find that a carrier exercises market dominance we have no jurisdiction to make a determination that a rate exceeds a reasonable max-

imum. Further, to the extent that petitioners prevail on administrative or judicial review, and to the extent a shipper is compelled to pay an unreasonable rate due to our market dominance evidentiary guidelines, reparations will be available to make it whole.

Petitioners assert that neither the railroads nor any other party will be hamred by the grant of the stay. At the most, petitioners contend, railroads will only be required to prove that the rates they charge are reasonable. For proceedings instituted after October 1, 1980, adjudication of rate reasonableness would only involve rates which produce a revenue to variable cost ratio of 160 percent or more. To the extent railroads are injured by having to adjudicate rates under the present market dominance rules, the injury is much less than the injuries which shippers would suffer under the new evidentiary guidelines.

We disagree. As noted above, the injury which might occur to petitioners is speculative and subject to redress. It is no different than any injury that may have occurred under our market dominance presumptions. On the other hand, the current market dominance rules inaccurately measure the extent of a rail carriers market dominance. To the extent that we perpetuate these rules, carriers will be forced to adjudicate the reasonableness of rates not intended by Congress to be the subject of challenge. Moreover, perpetuation of these rules would conflict with the carrying out of the transportation policy of 49 U.S.C. 10101a(1).

Public Interest

Public interest considerations weigh heavily in favor of expeditious implementation of the July 8, 1981 decisions. Through these decisions, the Commission has endeavored to ascertain more precisely the existence or non-existence of market dominance in any given case. Only through an accurate determination of whether market dominance exists will the Commission be able to know whether exercise of its reason-

ableness jurisdiction is necessary to protect the public from abuses of monopoly power.

It is ordered:

The petitions for stay of our July 8, 1981 decisions are denied.

By the Commission, Reese H. Taylor, Jr., Chairman.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

APPENDIX F**INTERSTATE COMMERCE COMMISSION
DECISION****EX PARTE No. 320
RAIL MARKET DOMINANCE****EX PARTE No. 320 (Sub-No. 2)
MARKET DOMINANCE DETERMINATIONS AND
CONSIDERATION OF PRODUCT COMPETITION**

Decided: October 1, 1981

Petitions have been filed¹ requesting that we reconsider these decisions served July 8, 1981.² In these decisions the market dominance presumptions were eliminated in favor of evidentiary guidelines. We also sanctioned the use of product (including geographic) competition as relevant evidence. The railroads have replied.

The petitions may be granted only upon a showing of material error, new evidence, or changed circumstances. We are unable to identify any material error, new evidence, or changed circumstances which warrant reopening the prior decisions.

This decision will not significantly affect either the quality of the human environment or conservation of energy resources.

¹Petitions by the Houston Port Bureau, Inc., Secretary of Agriculture of the United States, American Paper Institute, Inc., The National Industrial Traffic League, The Chlorine Institute, Inc., The Aluminum Association, Inc., The Fertilizer Institute, Carolina Power & Light *et al.*, Central Illinois Light Company *et al.*, Kerr-McGee Corporation *et al.*, and North Dakota State Wheat Commission *et al.*

²The Ex Parte 320 (Sub-No. 2) decision here referred to is the second of two issued in that proceeding. The first, which relates to the role of product competition in the analysis of a challenged rail rate, was served on May 18, 1981.

It is ordered:

The petitions are denied.

By the Commission, Chairman Taylor, Vice Chairman Clapp, Commissioners Gresham and Gilliam. Chairman Taylor concurred with a separate expression.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

CHAIRMAN TAYLOR, concurring:

Contrary to petitioners' assertions, I am not convinced that a shift from rebuttable presumptions to evidentiary criteria will necessarily compromise the ability of shippers to demonstrate market dominance on a case-by-case basis. However, I must question whether the new evidentiary criteria is consistent with our original Congressional mandate that we establish "standards and procedures" that, with regard to market dominance, will permit "a practical determination without administrative delay." Certainly, if our former presumptions could be characterized as crude and not always accurate, our present criteria could be characterized as something less than totally objective and unambiguous.

I must also profess reservations as to the practical application of geographic and product competition in market dominance determinations. For instance, I can envision a situation where a shipper interested in expanding into a new market is dependent upon a single carrier, except that the carrier's rate levels prevent the shipper from competitively entering the new market. By giving expression to geographic and product competition, would we deny the shipper the opportunity to contest the rate level and perhaps the opportunity to reach the new market simply because (1) there are still other markets available to the shipper,

(2) other sources of supply are available to the consignee, or (3) interchangeable products or commodities are available to the consignee in sufficient quantities at competitive costs. Notwithstanding the issue of whether the statutory definition of market dominance was intended to embrace geographic and product competition, I am willing to resolve my reservations by reviewing allegations of geographic and product competition on a case-by-case basis.

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 81-4257, 81-4259, 81-4277, 81-4299, 81-4334,
81-4347, 81-4354, 81-4357, 81-4365 to 81-4369,
81-4373, 81-4415, 81-4423 and 82-4021

WESTERN COAL TRAFFIC LEAGUE
and Its Members, ET AL.,
Petitioners,
versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

Petitions for Review of an Order of the Interstate Commerce Commission

Before CLARK, Chief Judge, BROWN, RUBIN, REAVLEY,
POLITZ, TATE, JOHNSON, WILLIAMS, JOLLY
and HIGGINBOTHAM, Circuit Judges.*

JUDGMENT

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc with
oral argument;

*Judges Thomas Gibbs Gee, Carolyn Dineen Randall and Will Garwood, recused themselves and did not participate in the decision.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by the Court that part III, sections 1, 2, 3 and 4 of the opinion entered by a panel of this Court on December 8, 1982 is adopted as the opinion of the Court en banc; the decision of the Interstate Commerce Commission is affirmed by the Court en banc.

IT IS FURTHER ORDERED that petitioners and petitioners-intervenors pay to respondents the costs on appeal, to be taxed by the Clerk of this Court.

NOVEMBER 14, 1983

RUBIN, Circuit Judge, with whom REAVLEY, Circuit Judge, joins, dissenting.

ISSUED AS MANDATE: DEC 8 1983

APPENDIX H

Ex Parte No. 320[*]

SPECIAL PROCEDURES FOR MAKING FINDINGS OF MARKET DOMINANCE AS REQUIRED BY THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976

Decided August 20, 1976

Upon investigation, standards and procedures to be used in market dominance determinations adopted as part 1109.1 of Title 49 of the Code of Federal Regulations, subject to further comment of the parties. [353 I.C.C. 875]

* * *

Interim Report of the Commission

By the Commission:

The institution of this rulemaking proceeding was mandated by Congress in section 202 of the "Railroad Revitalization and Regulatory Reform Act of 1976."¹ Therein the Commission is directed to establish rules and procedures for determining whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Pursuant to this directive, on March 10, 1976, the Commission issued a Notice of Proposed Rulemaking and Order² in which it

Relevant excerpts from this decision, which is reported in full at 353 I.C.C. 874 (1976), are set forth herein. Deletions in the text are designated by asterisks [" * *"]. Each deletion is preceded by a bracketed insert identifying the pages of the printed decision that are excerpted, e.g., [353 I.C.C. 876-878] means that the preceding section appears on those pages in the official report.

¹Public Law 94-210, hereinafter the 4R Act. Portions of section 202 which relate to market dominance are set forth in Appendix E.

²A copy of the Notice of Proposed Rulemaking and Order is attached as appendix A.

set out proposed amendments to Title 49 of the Code of Federal Regulations.

The amendments³ contained proposed procedures and requirements to be used in making determinations relating to market dominance. Evidentiary and procedural requirements were set out, as well as a number of factual situations, the showing of any one of which would establish a rebuttable presumption of market dominance on the part of the carrier or carriers involved. All interested parties were invited to participate in the proceeding, and in accordance with congressional intent, the recommendations of the Attorney General and of the Federal Trade Commission were solicited.

General Introduction

The Commission's approach as set out in the Notice of Proposed Rulemaking and Order was designed to provide standards and procedures for determining, without administrative delay, whether and when a carrier possesses market dominance over a service. Therein we noted that the legislative history of section 202 of the 4R Act indicates that the Commission is not to be strictly bound by antitrust concepts and precedents. We pointed out that pursuant to the Interstate Commerce Act (the act), as amended by the 4R Act, the Commission must make a market dominance determination within 90 days of the institution of a proceeding in which a rate is challenged as being unreasonably high, and, where suspension of an increased rate is at issue, the determination may be required within 30 days of the rate filing.

As we observed in the Notice, and as contemplated by Congress, the statutory time constraints require that evidence be gathered promptly and measured against reasonable substantive standards. With these time constraints in mind, we proposed the use of rebuttable presumptions which would operate in spe-

³The original designation of the amendments as 49 CFR 1108, was changed to 49 CFR 1109 in 49 F.R. 12231, March 24, 1976.

cified circumstances. The seven factual patterns proposed were designed to create rebuttable presumptions of market dominance in situations where experience has shown that the railroads typically possess such dominance. In any proceeding involving a market dominance determination, establishment of the existence of one or more of the proposed fact patterns would create a rebuttable presumption that the carrier whose rates are in issue has market dominance over the involved traffic or movement. The seven factual situations were proposed as follows:

- (1) Where the rate in issue has been discussed or considered in proceedings before a rail carrier rate bureau acting under an agreement filed with and approved by the Commission pursuant to section 5b, or the former section 5a, of the Interstate Commerce Act;
- (2) Where no other carrier of any mode has handled a significant amount of the involved traffic for at least 1 year preceding the filing of the proposed rates;
- (3) Where other carriers of any mode have handled a significant amount of traffic but there is no evidence of actual price competition in the past 3 years;
- (4) Where the rate in issue exceeds the rate(s) charged by other carriers offering the same or interchangeable service between points involved by 25 percent or more;
- (5) Where the rate in issue exceeds the fully allocated cost of providing the service by 50 percent or more;
- (6) Where the distance between origin and destination exceeds 1,500 miles, except that when the involved movement occurs as a single-line movement, market dominance may be presumed where the distance exceeds 1,200 miles, provided, however, in either instance that when a rate is subject to a minimum weight, such minimum weight shall equal or exceed 20 net tons;
- (7) Where the commodity moving under the rate in issue customarily moves in bulk shipments.

As the Commission pointed out in the Notice, the first presumption dealing with rate bureaus was based on congressional instructions contained in the Conference Report which accompanied the 4R Act as finally passed. In the Report, the Committee of Conference stated its intention that there should be presumed to be an absence of competition between railroads with respect to any rate discussed or considered under an agree-

ment approved by the Commission pursuant to the new section 5b of the act. The second presumption, dealing with market share, and the third, dealing with pricing behavior, directly addressed the presence or absence of competition. The fourth presumption, dealing with rate relationships, and the fifth, dealing with the concept of monopoly pricing, focused on the carrier's ability to exact a premium for its service. The sixth and seventh presumptions identified service and commodity characteristics of markets where railroads have traditionally been free of effective competition. In addition to the proposed presumptions, the Notice also sets out evidentiary requirements for carriers and complainants. [353 I.C.C. 876-878]

* * *

d. *Representations: Market definition.* — In general, Justice, DOT, and the railroads advocate a broad market definition including, in addition to carrier competition for the specific movement, competition of substitute products, geographic competition, and potential competition. Briefly stated, product substitution refers to the shipper's or receiver's option to use commodities which are interchangeable for the commodity named in the issue tariff; geographic competition is shipper use of alternative destinations or sources for the products to which the rate applies; and potential competition is the possibility that carriers not presently sharing the market will enter if the rail carrier raises its rates. Justice would consider movements which are competitive under any one of these theories in calculating market share, while the railroads and DOT would consider such evidence only after determining market share based on direct carrier competition.

In sharp contrast, shippers and shipper interests are almost unanimous in their support of a market definition which is confined to carrier competition for the specific movement to which the rate applies.

Justice would define the words "market" and "traffic" in the definition of market dominance in section 202 to include

(1) movements of the same commodity from other sources, and (2) movements of substitute products. It argues that the rate from one source circumscribes the rate a railroad can charge for moving the same commodity to a particular destination from other sources, as the carrier will adjust its rates to allow shippers it serves to compete for the sale of their product. Justice argues that rates may be kept at competitive levels if there are close substitutes for the goods which are being transported, and shippers can receive the substitute by another carrier. Justice also contends that a railroad's statistically high percentage of the market results in some cases from entry limitations imposed by the Commission, and it urges a standard based on a demonstration that other carriers would enter the market but for the lack of certification.

DOT argues that the legislative words "market" and "traffic" require further definition and that the use of these terms must have contemplated competition other than carrier competition between the points to which the rate applies. If the consignee has the alternative of receiving the commodity it needs from another source, thereby using a different carrier, DOT would maintain that effective competition exists within the meaning of the 4R Act. However, DOT does not advocate that "geographic competition" be considered in calculating market share, but suggests that if effective competition is not demonstrated under the market share test, the railroad should then have the opportunity to prove geographic competition.

DOT maintains that rail carrier ratemaking is influenced by the prospect that an increase will cause substitution of one commodity for another or a restriction in the extent to which a commodity can compete geographically. It argues that the Commission should consider a broad range of choices available to shippers and consignees. These shipper alternatives include use of another common carrier of another mode, use of an unregulated carrier, change in inventory and shipment size policy, change in marketing policy, change in products produced, or

change of location. If the shipper has one of these available, then the rail carrier is not in a position to dominate the market. DOT admits that the decision to adopt one of these latter alternatives is generally long run in nature.

DOT also stresses the importance of potential competition as a regulator of carrier behavior, and argues that a key test of market dominance should be whether, given freedom of entry, competition would develop and limit the bargaining strength of an otherwise dominant rail carrier.

The railroads maintain that in making market dominance determinations we must consider "the full range of constraints that the market imposes on a given carrier's power over the rates for specific traffic or a specific movement." While agreeing with Justice that source competition and product substitution are relevant factors to be considered in determining market dominance, they do not support the broad market share test which Justice has proposed: "As a practical matter we have difficulty in seeing how such traffic could be routinely taken into account in ascertaining whether or not the specified percentage had moved by other modes."

The railroads contend that antitrust precedent such as the *Du Pont* case, *supra*, and the House and Senate Reports, would support the determination of effective competition in the context of a product market and a geographic market. They argue that effective competition exists within the meaning of the 4R Act where a buyer of the transported commodity can readily shift to another source of supply. These sources, they maintain, are in the relevant product market for determining whether effective competition exists. Likewise, it is argued tht the relevant product market includes substitue products which could be delivered by other carriers or carriers of other modes.

Also in support of their market definition, the railroads argue that the importance of competition from substitute products and alternate geographic sources has been recognized by this Commission in numerous cases. They state that the Commission

has found various mergers to be consistent with the public interest, relying at least in part on these types of competition. The railroads also contend that "The competition of other modes regulated and exempt, for-hire and private has repeatedly been held to justify rates which might otherwise have been found in violation of various provisions of the Interstate Commerce Act." For example, they note, if truck or water carriers are competing for traffic even from an area not directly served by a railroad, but with the effect of disadvantaging the railroad's position and that of its customers, the carrier can lawfully make a competitive marketing response in order to protect its competitive position and that of the shippers. The railroads also maintain that "the reasonable prospect of competition" should be considered, as where an increase [sic] rate would be likely to divert traffic to another carrier or another mode, including private carriage.

USRA would define the market to include shipments of substitute commodities moving to the same destination from sources of comparable or shorter distances. It would include private carriage in the calculation of market share.

Numerous shippers and shipper interests object that the market definition proposed by the railroads and Government agencies is overly broad, and goes beyond the statute. They argue strenuously that the intent of Congress is clear that a finding of the absence of market dominance must be predicated on the existence of carrier competition. NERA objects that the approach advocated by the railroads would require a consideration of "every conceivable factor that in any time frame, however remote, could limit in any way a railroad's ability to raise its rates without risking loss of business." Shippers are concerned that an overly broad market definition will have the practical effect of denying them a forum to redress unreasonable rate increases.

Shippers maintain that proponents of a broad market definition have urged a misreading of *Du Pont supra*, an important

decision delineating "the product market" under the Sherman Act. The shippers argue that *Du Pont* does not support, even by analogy, a consideration of substitute commodities moving in commerce in making market dominance determinations. In *Du Pont* the court found that although defendant produced almost 75 percent of the cellophane sold in the United States, it produced less than 20 percent of all the flexible packaging material. The court said that control of the market depends upon the availability of alternative commodities for buyers. Shippers argue, however, that with regard to market dominance we are dealing with a market for services, and not for commodities, and that we must be concerned with alternative transportation services which can be substituted for the proponent rail service. They maintain that the Commission should consider only the commodity moving under the rate in issue, and not other commodities which may or may not be feasible substitutes from the shipper's viewpoint.

The shippers further maintain that our analysis of competition should be confined to the specific traffic or movement to which the rate applies. They argue that "so called geographic competition" or competition from traffic that could not move under the rate in issue cannot be depended on as an effective regulator of rates, since the rail carrier is under no obligation to adjust its rates to meet competition that shippers face in the distribution of their product. *Du Pont* contends that the proper approach would be to consider commercially feasible alternatives to cover shipment of a particular commodity from a specific shipping point to a specific destination. The Drug and Toilet Preparation Conference and New England Grain and Feed expressed very similar views.

NERA, The Upper Great Plains Traffic Institute, and Phillips Petroleum propose that the Commission consider whether the shipper has a choice of carriers to move its goods. They argue that even if there is a high degree of competition in many segments of the railroad industry, this competition is of no avail

if the shipper has no realistic alternatives in a particular situation.

NERA urges that in assessing the competitive situation of the railroads, we consider the short time period during which the rate in issue will be in effect. It argues that if shipper alternatives require considerable time for their implementation, then they are not likely to be effective regulators of rail rates. NERA also suggests that movements during periods of extraordinary situations such as an act of God, a strike, or a railcar shortage, should not be considered in calculating market share.

e. *Conclusions.*— An appropriate market definition is necessarily a crucial aspect of any test for market dominance, and particularly a test based upon a share of the market theory. If shippers and carriers are to make timely evidentiary presentations, they should know what evidence is relevant in the calculation of market share, and what evidence will be considered in rebuttal of an inference of market dominance.

The focus of our analysis is section 202 of the 4R Act which defines market dominance as "an absence of effective competition from other carriers or modes of transportation for the traffic or movement to which the rate applies." With only this brief definition as a guideline, this Commission is specifically directed to establish both standards and procedures for making market dominance determinations, and to design rules to provide for "a practical determination without administrative delay." After assessing the statutory language and considering the need for quickly identifying whether effective competition is present, we have concluded that the appropriate market is the market for transportation services which directly compete [sic] with the service outlined in the tariff under consideration. Limiting consideration to direct carrier competition is consistent with the express language of the legislative definition, and is essential to making practical determinations in a short time period.

The contention of some of the parties that use of the word "traffic" in conjunction with the word "movement" requires consideration of a broad range of movements of various commodities moving from various sources to various destinations must be rejected. The 4R Act speaks of "the traffic or movement to which the rate applies." When used in this context in the transportation industry, the word "movement" refers to transportation from a single origin point to a single destination point, while the word "traffic" commonly denotes transportation services from a named set of points to another point or set of points; from specific origin points or areas to rate groups or blanket areas; or between stated mileage brackets on particular commodities in a given territory. There is no language in the legislation which would warrant the extension of the phrase "traffic or movement to which the rate applies" beyond transportation services which are comparable to that described in the issue tariff.

Even if the market definition of the 4R Act were not so explicit, practical considerations would force us to the same conclusion. It is true that the forms of competition which the railroads, Justice, and DOT have discussed, such as product substitution and geographic competition, could have an impact upon the ability of rail carriers to raise their rates. Nevertheless, determining whether these factors have a significant impact in a particular case would require lengthy antitrust-type litigation, as the interplay which affects competition for the sale of a product and competition for transportation services is very complex. If the parties concentrate their efforts on gathering and presenting evidence of direct carrier competition, then the Commission will be able to make these threshold determinations promptly, and the expense to the parties and the public will be minimized.

The difficulty of considering movements from alternate origins or to alternate destinations stems from the fact that transportation is but one of many costs in the process of production; other costs include labor, capital, materials, other

distribution costs, profit, and taxes. The railroads imply that if producers are at a disadvantage in marketing a product in a particular area, rail carriers will automatically reduce their rates to allow the shipper to compete. Although the shipper in this situation will bargain with the carrier and attempt to obtain reduced rates, it may be forced to reduce one of the other costs of production or its profit margin. Whether or not the shipper is in a position to bargain effectively will depend upon a number of factors including the value of the shipper's traffic to the carrier, and the elasticity of demand for the shipper's product.

Cases cited by the railroads and DOT under section 3(1) of the Interstate Commerce Act represent situations where the railroads have responded to competitive pressures and reduced their rates. In these cases, the Commission has held that competition can justify unequal rate treatment which would otherwise be unlawful preference and prejudice. However, the railroad may be able to force the shipper to absorb the differential by reducing its costs or its profit margin, or may be able to produce more revenue by maintaining its higher level of rates on a diminished amount of traffic. Obviously it will not be possible to explore all of these possibilities in the context of making a threshold market dominance determination.

Proponents of a broad market definition also argue that evidence of geographic competition has been used to support findings that the anticompetitive effects of mergers and consolidations are outweighed by the economic efficiencies to be gained. This Commission has recognized in cases under section 5(1) of the Interstate Commerce Act that competition from carriers serving other sources and other destinations will, over a long enough period of time, tend to mitigate a rail carrier's market power. But this prospect does not amount to the "effective competition" which is required by the 4R Act. For there to be effective competition such as would make rate regulation unnecessary, there would have to be the likelihood of a substantial diversion of traffic within the time period during which the rate

in issue is in effect, and often a shift in supply and distribution patterns is a costly and time-consuming process.

Several of the parties have argued that the *Du Pont* case would support by analogy the substitute commodity theory of effective competition. They would find competition where a shipper or consignee can meet its requirements by shipping or receiving a substitute commodity which is moved by another carrier. The *Du Pont* case is not strictly analogous, as it involves an alleged monopoly in the sale of a product, while here we are concerned with market dominance in the sale of a service. Just as the Court's focus was broadened from cellophane to flexible wrapping materials in *Du Pont*, our focus must include not only rail transportation, but the totality of available transportation services. Thus we are already faced with the complex question, parallel to that addressed in *Du Pont*, of whether the transportation services offered by various modes of transport are interchangeable. But to extend this analysis one step further and explore the question of whether a particular commodity is reasonably interchangeable from the shipper's standpoint would require extensive factfinding. If the substitute commodity is slightly different in terms of price or quality it may not be interchangeable, or the shipper may be forced to absorb the rate increase to the extent of the price differential before switching to the alternative commodity. Surely Congress did not intend to burden this Commission or the parties with such complex issues in making these threshold determinations.

The approach we took in *Navajo* to define the appropriate product market for the purposes of section 7 of the Clayton Act would also be appropriate here. In that case, after a careful analysis of relevant transportation circumstances, we determined that a particular class of carriers provides a unique transportation service which no other carriers, regardless of mode, can provide. Accordingly, the relevant product market was identified as "transportation by regular route motor common carrier of general commodities, with the usual exceptions, in LTL quantities, weighing 10,000 pounds or less."

U

Similarly, the relevant market for the purposes of the market share test is the range of transportation services available for moving a particular commodity from a particular shipper or shippers located at or near the origin area named in the tariff to a consignee or consignees at or near the named destination area. As the statute directs us to take into consideration the services offered by other carriers and other modes, these services will be considered in the calculation of market share if they are interchangeable.

As we assess the relevant product market for purposes of the 70 percent test it is essential to determine in a timely manner whether the services of other carriers are in fact reasonable substitutes and for this purpose shippers and carriers will be required to supply evidence of circumstances which may affect shipper ability to take advantage of services of other rail carriers or carriers of other modes.

As we have indicated, a number of parties believe that we should give consideration to potential competition in the application of our market share test. To some extent, our requirement that competing carriers must handle at least 30 percent of the traffic accounts for potential competition. Where existing for-hire carriers already handle 30 percent of the traffic, we assume that they would ordinarily be in a position to handle more should the traffic be diverted by higher rail rates. On the other hand, the prospect of competition from carriers not already in the market is necessarily more speculative. It will often be difficult to determine at what level of rates additional competitors would enter the market, and how much time it would take for these carriers to increase their capacity to handle the traffic. Also if no carriers of a particular mode are currently servicing a particular market, then there is a question as to whether transporting the involved commodity by this mode would be economically feasible.

We do not wish to preclude carriers from presenting evidence of potential competition to rebut the presumption of market

dominance under the market share test. However, general allegations of potential competition can be given little weight. The railroads must affirmatively show that there is a probability that additional carriers will enter the market as a result of the proposed rate increase. They will be required to establish the existence of carriers on the edge of the market who have the necessary authority where relevant, and equipment to serve the shippers in question. Where possible, the rail carrier should present evidence of the current rates charged by these potential competitors. In addition, evidence of whether or not diversion resulted in the past as a result of similar rate increases would be highly relevant.

The proposal that we consider competition from carriers who would enter the market but for regulation is totally without merit. This Commission is required by the Interstate Commerce Act to certify motor carriers according to a standard of public convenience and necessity. If a carrier does not have operating authority, then by definition it cannot enter the market, and cannot provide effective competition. The proposal seems to imply that the certification process is designed to protect rail carriers from motor competition. To the contrary, a shipper is entitled to the advantages inherent in a particular mode of service, and motor carriers are not excluded from the market to protect the interests of rail carriers.

The existence of private carriage in a market cannot be given the same consideration as traffic moving for-hire, as private carriage does not have the same competitive impact. The private carriage of one company cannot be said to compete for the traffic or movements of another. Such private carriage is not an alternative service which vies for the traffic of other firms. Furthermore, it is difficult to conceptualize how a firm's private carriage could actively compete for its own traffic, as ordinarily private carriage is used only when common carriers are unable to provide the particular service that the shipper needs. Private carriage is only profitable to the firm in those limited situations

where the company is large and diverse enough to decrease its empty-return ratio by arranging backhauls. The cost of private carriage may be said to set a ceiling above which rail carriers cannot raise their rates without fear of losing the traffic. The problem is that there is no assurance that this ceiling will be low enough to assure just and reasonable rates. Especially where private carriage is inefficient, or where the inherent advantages of rail transport over motor transport are great, private carriage could not be considered as effective competition within the meaning of the 4R Act.

Traffic moving by exempt carriage will be considered in calculating market share where adequate tonnage figures are available. However, there may be problems in this area because usually neither the shipper protestant nor the railroad know to what extent other shippers taking the rate use exempt carriers. If shippers and carriers have difficulty in presenting market share evidence where exempt commodities are involved, it may be necessary in the future to devise presumptions and procedures applicable to this area. [353 I.C.C. 900-909]

* * *

Findings

We find that implementation of the standards and procedures contained herein would enable the Commission to make prompt determinations as to market dominance without undue delay, in accordance with the congressional intent expressed by section 202 of the Rail Revitalization and Regulatory Reform Act of 1976.

We further find that the proposed rules are sound, equitable, and reasonable, and that the principles contained therein should be adopted, subject to consideration of further comments in this proceeding.

And we further find that this is not a major Federal action significantly affecting the quality of the human environment

within the meaning of the National Environmental Policy Act of 1969. [353 I.C.C. 930-931]

* * *

APPENDIX D

Legislative history of market dominance

Since the Transportation Act of 1958, there has been discussion of Interstate Commerce Commission ratemaking reform. The first proposal approved by either House of Congress was contained in the Surface Transportation Act of 1974¹ which was passed by the House in October 1974, but was never taken up by the Senate. Section 306 of that act, in addition to tightening standards for Commission suspension of rate changes, would have removed the Commission's suspension power within a 7-percent up or 7-percent down "no-suspend zone."

When DOT offered its proposed Rail Revitalization Act of 1975² it again proposed a "no-suspend zone" as the key means of affording rate flexibility to the railroads. This version of the "no-suspend zone" would have allowed, without risk of suspension, a 7-percent increase or decrease in the first year, 12 percent the second year, and 15 percent each year thereafter.

This proposed regulatory reform was viewed as a way of according rate flexibility to the railroads — a policy which would have various benefits in the eyes of various proponents. To DOT and the Administration sponsors of the "no-suspend zone" provision, rate flexibility would lead to increased competition and was "specifically designed to cause a reduction in rates which are too high and are inequitable to shippers and consumers."³ The railroads also valued rate flexibility, but for a

¹H.R. 5385, 93d Cong. [sic], 2d Sess. (1974).

²H.R. 7681, 94th Cong., 2d Sess. (1975) (the "DOT Bill").

³DOT press release dated May 19, 1975 to announce that the President had sent the Administration's "Railroad Revitalization Act" to Congress.

different reason. According to Stephen Ailes, president of the Association of American Railroads (AAR), rate regulation holds rates down and costs the railroads the additional revenues which would become available given rate flexibility.⁴ Secretary of Transportation Coleman took the middle ground by finding that rate flexibility would both raise and lower rates. "The ratemaking provisions of the [proposed DOT] Act will cause a reduction of rates that are too high and unfair to shippers, and will cause an increase of rates that are too low and not compensatory to carriers."⁵ Thus, it is evident from this testimony that rate flexibility has meant many different things to different people.

Although the DOT bill was introduced in the Senate, it appears that the Subcommittee on Surface Transportation of the Senate Commerce Committee rejected the Administration's concept of rate flexibility embodied in a no-suspend zone. Instead, S.2265 which was introduced by Senator Hartke, the Chairman of the Surface Transportation Subcommittee, and which formed the basis of the Senate version of the final bill, contained a "market dominance" provision which was a completely novel and creative approach.⁶ In this provision Commission regulation of maximum rates was limited to situations

⁴Hearings on Legislation Relating to Rail Passenger Service Before the Subcommittee on Surface Transportation of the Committee on Commerce of the United States Senate, 94th Cong., 1st Sess., Part 4 at 291-92 (1975) (hereinafter cited as Senate Hearings).

⁵Statement by U.S. Secretary of Transportation, William T. Coleman, Jr., on the Railroad Revitalization Act at the White House News Conference, Washington, D.C., Monday, May 19, 1975.

⁶It has been suggested that Canadian provisions limiting rate regulation to captive shipper situations might be a precedent for the Senate provision; but there is no mention of the Canadian legislation in the legislative history, and the Canadian captive shippers concept seems too far removed from market dominance for the Canadian experience to have any direct bearing on the definition and application of the market dominance concept.

where the carrier had "market dominance." In this initial S.2265 draft market dominance was defined as follows:

"Market dominance" means with respect to a carrier subject to this Act, the ability to charge as a consequence of the absence of effective competition, from the carriers or from other modes of transportation, a rate that unreasonably exceeds the cost of providing the service involved.⁷

AAR, while favoring the rate flexibility contemplated in the Administration's no-suspend zone proposal, strongly opposed the market dominance concept on the ground that it would lead to burdensome litigation and would "establish an upper limit on rate adjustment flexibility."⁸

DOT continued to advocate its no-suspend zone rate flexibility as a way to avoid "delays costs, uncertainties and mistakes."⁹ Nevertheless, DOT found the market dominance concept a meritorious and important alternative, so long as there was involvement of the "Department of Transportation in the process for determining the standards for market dominance in order to counterbalance the tendency of the Commission to see monopoly where none exists."¹⁰

ICC comments on the original market dominance provision reflected general approval of the concept that maximum rate regulation is not necessary where competitive market forces are sufficient to protect the public from unreasonably high rates. Serious questions, however, were raised about the workability of the provision as drafted. In particular, the Commission was concerned that the analogy to antitrust concepts could lead to a great deal of highly complex antitrust-type litigation. In addition, the Commission was concerned that the definition of

⁷S.2265, 94th Cong., 1st Sess. §103 (a)(5)(B)(ii)(1975).

⁸Statement of Stephen Ailes, Senate Hearings, Part 4, at 1002.

⁹Statement of Secretary Coleman, Senate Hearings, Part 4, at 1017.

¹⁰*Id.*, at 1917-18. See also Senate Hearings, Part 5, at 1745-46.

market dominance cover oligopoly as well as pure monopoly situations.¹¹

The Commerce Committee and the staff redrafted the market dominance provision into the form in which it appeared in section 103 of S.2718 reported by the Committee to the Senate on November 26, 1975.¹² This version continued to reject the DOT concept of rate flexibility embodied in the no-suspend zone pro-

¹¹Statement of The Honorable George M. Stafford, Chairman of the ICC, Senate Hearings, Part 4, 974-76.

¹²S. Rep. No. 94-499, 94th Cong., 1st Sess. (1975). The market dominance provision in section 103 of S.2718 was reported as follows:

(5)(A) *** Notwithstanding any other provisions of this part, no rate shall be found to be unjust and unreasonable, on the ground that such rate exceeds a just or reasonable maximum for the service rendered or to be rendered unless the Commission has first found that the proponent carrier has market dominance over such service. A finding that a carrier has market dominance over a service shall not create a presumption that the rate or rates for such service exceed a just and reasonable maximum ***.

(B) As used in this paragraph, the term- (i) "market dominance" refers to an absence of effective competition for the traffic to which a rate applies from other carriers or modes of transportation. Market dominance shall be presumed to exist if, prior to or after the publication of a rate, no shipment (except an occasional or emergency shipment) of the traffic to which the rate applies has moved by any carrier or mode of transportation, other than by the proponent carrier during the 12 months preceding the commencement of the Commission's proceeding to determine or investigate the lawfulness of the rate as a result of the relationship of the applicable rate (or cost of service in the case of a private carrier) of any other carrier or of any other mode (including exempt and private carriers) of transportation, to the rate of the proponent carrier; and (ii) "rate" means any rate or charge for the transportation of persons or property.

[footnote continued]

posal, and responded to ICC concerns by defining market dominance in terms of "an absence of effective competition for the traffic to which a rate applies from other carriers or modes of transportation," and by making clear that it is the proponent carrier or carriers proposing the rate which must have market dominance.

In addition, section 103 provided specifically for market dominance determinations to be made in accordance with rules "designed to provide for a practical administrative determination without delay." These changes abated in substantial part the ICC's previously expressed concerns regarding its ability to protect the public in oligopoly situations and the danger of becoming bogged down in antitrust-type litigation. The Senate Committee did not respond to the DOT request that it be given a direct role in formulation of market dominance regulations. Instead, it left standing the language of S.2265 which provided

[footnote continued]

(C) Within 240 days after the date of enactment of the Rail Services Act of 1975, the Commission shall establish, by rule, standards and procedures for determining, in accordance with section 15(8) of this part, whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rules shall be designed to provide for a practical determination without delay. The Commission shall solicit and consider the recommendations of the Attorney General and of the Federal Trade Commission in the course of establishing such rules.

(b) Section 15 of the Interstate Commerce Act (490 U.S.C. 15) is amended by renumbering paragraphs (8) through (14) thereof as paragraphs (9) through (15) thereof, respectively, and by inserting therein a new paragraph (8) as follows:

(8) Whenever a rate is challenged as being unreasonably high, the Commission shall, upon complaint or upon its own initiative and within 90 days after the commencement

[footnote continued]

an advisory role for the FTC and Justice Department, Antitrust Division, but not for DOT.¹³

The Senate Commerce Committee Report indicates that the Committee favored balancing the railroads' needs for rate flexibility with protection for shipper interests. In its discussion of the market dominance concept the report states:

Commission regulation of maximum rate levels will apply only when the railroad or railroads publishing a rate increase set [sic] market dominance over the service involved. Otherwise, in truly competitive markets the railroads will have freedom, absent discrimination

[footnote continued]

of a proceeding to investigate the lawfulness of such rate, determine whether the carrier proposing such rate has market dominance, within the meaning of section 1(5)(B)(i) of this part, over the service to which such rate applies. If the Commission finds that a carrier does not have such market dominance, such finding shall be determinative in all additional or other proceedings concerning such rate or service, unless (A) such finding is modified or set aside by the Commission, or (B) such finding is set aside by a court of competent jurisdiction. Nothing in this paragraph limits the Commission's power to suspend a rate pursuant to paragraph 7 of this section, except that if the Commission has found that a carrier does not have such market dominance over the service to which a rate applies, the Commission may not suspend any increases in such rate on the ground that such rate as increased exceeds a just or reasonable maximum for such service, unless the Commission specifically modifies or sets aside its prior determination concerning market dominance over the service to which such rate applies.

¹³It should also be noted that this Senate Committee draft added a presumption to the market dominance definition. Without binding the Commission's hand in any other fashion, the presumption called for a market dominance finding when no competitive carrier had moved the traffic in 1 preceding year.

and prejudice, to raise prices as they choose in order to maximize revenues.

The key to this new provision is in the definition of market dominance. Market dominance is defined in terms of the lack of effective competition avoids the problems of defining monopoly power which have arisen under the antitrust laws. Under this definition the publishing carrier need not have monopoly power. Rather the test will be whether the market itself is sufficiently competitive to insure just and reasonable rates. Thus, the Commission will be able to regulate maximum rates in oligopoly or concentrated markets as well as in monopoly markets. Lengthy antitrust-type litigation will be avoided by virtue of the Commission's authority to adopt rules of practical application which will identify markets in which dominance exists.

The market dominance test is not designed to be an ultimate regulatory standard. Instead, it is designed as a threshold test to direct the Commission's regulatory activities into areas where the public interest needs protection, while deregulating and giving flexibility to the railroads in areas where effective competition from other railroads and other modes can supplant the need for maximum price regulation.¹⁴

In addition, the report states that "ratemaking revisions to assist the railroads must continue protections for the public interest as a whole,"¹⁵ and that the Commission will continue to be able to regulate maximum rate tariffs unless there is effective competition which insures that rates do not exceed a just and reasonable level.¹⁶

¹⁴*Id.*, at 47.

¹⁵*Id.*, at 14.

¹⁶*Id.*, at 46.

There are, to be sure, references to assisting the railroads by relaxing rate regulation. For instance the report talks generally about the railroads need for more revenue:

*** If railroads are to increase their revenues and attract the resources necessary to revitalize the industry, they must be able to raise their rates in a timely fashion, free from regulation in markets sufficiently competitive to prevent abuses of monopoly power ***. [Id., at 9-10].

In particular, there seemed to be a concern that railroads be relieved from regulatorily imposed cross-subsidization sufficiently to allow them to raise rates to a minimum variable cost level:

***The Commission has, on the one hand, frequently used the power it possesses to hold down rates, often to protect the movement of commodities that would otherwise be isolated geographically. This "cross subsidization" policy has been an important part of public transportation policy since the beginning of Commission regulation. Nevertheless, changes in the economic strength of the railroads and their ability to cross-subsidize seem to require some changes in that policy. [Id., at 10-11.]

Committee action in the House of Representatives resulted in a House bill which was closer to the position of the Administration. Initially, in addition to DOT's proposed "Railroad Revitalization Act," Congressman Brock Adams of Washington introduced in H.R. 6351, a cut-down version of the Surface Transportation Act which had been passed the year before.

In hearings before the Subcommittee on Transportation and Commerce of the Committee on Interstate and Foreign Commerce of the House of Representatives, DOT and the railroads favored the no-suspend zone, rate flexibility approach, which

the ICC strongly opposed.¹⁷

After the hearings the subcommittee staff prepared a new bill, H.R. 9802, which was introduced by the Subcommittee Chairman, Congressman Rooney, on September 23, 1975. This new bill adopted the no-suspend zone approach of the Administration, but limited the no-suspend zone to 7 percent a year during a 3-year experiment.

Subsequently during the subcommittee mark-up on the bill a market dominance provision was added by the subcommittee staff. This provision was further refined by amendment offered by Congressman Skubitz, the ranking minority member on the subcommittee. This subcommittee version appears in section 301(g) and (h) of H.R. 10979, a "clean bill" reported to the Full Committee on December 3, 1975, by Chairman Rooney and the members of the Subcommittee following extensive work sessions marking up H.R. 9802.¹⁸

¹⁷Statement of the Honorable William T. Coleman, Secretary of Transportation, in hearings before the Subcommittee on Transportation and Commerce of the Committee on Foreign Commerce, the House of Representatives on Railroad Revitalization, Serial No. 94-38, 94th Cong., 1st Sess. 1975, at 151-157; Statement of Stephen Ailes, president of AAR, *Id.*, at 562-64; and Statement of The Honorable George M. Stafford, Chairman of the ICC, *Id.*, at 240-52.

¹⁸Subsections (g) and (h) of section 301 of H.R. 10975, as introduced on December 3, 1975, read as follows:

(g) Following the promulgation and review of the initial standards established pursuant to subdivision (h), no rate shall be found unjust or unreasonable on the ground that it is too high unless the Commission determines that the common carrier by railraod charging the rate has market dominance.

(h) Within 180 days after the date of enactment of this paragraph, and from time to time thereafter as may be necessary, the Commission, in conjunction with the Secretary, shall establish detailed standards and pro-

[footnote continued]

In this House subcommittee provision, as in the Senate provision, the Commission was required to find market dominance before finding a rate too high and the determination was to be made in accordance with rules to be adopted by the Commission. Nevertheless, the Senate definition of market dominance in terms of lack of effective competition was replaced by geographic and market share definitions. Moreover, the Commission was not given full discretion in promulgating rules to implement the provisions. Rather the rules were to be made "in conjunction" with DOT.

When the full Interstate and Foreign Commerce Committee held mark-up sessions on H.R. 10979, the market dominance provision was further amended in accordance with an amend-

[Footnote continued]

cedures for determining whether and when a common carrier by railroad possesses market dominance over a particular rate or rates. In establishing such standards, the Commission and the Secretary shall define market dominance as any situation in which (i) in a particular geographical area, there are not at least two competing common carriers by railroad, or a common carrier by railroad and an alternate mode of transportation which both compete for the business of all shippers in such area; or (ii) with respect to any single commodity or type of goods, there are not at least two competing common carriers by railroad, or a common carrier by railroad and an alternate mode of transportation which provides transportation for such commodity or type of goods in a reasonably effective and competitive fashion.

In establishing such standards, the Commission and the Secretary shall also consider such factors as they find relevant, including: the size and assets of involved carriers; the transportation characteristics of the commodity or commodities involved; the degree of participation of regulated and unregulated carriers of the same and different modes of transportation in the services involved; the ease of entry of potential competitors; and the level of profit obtained in providing the particular transportation service involved.

ment introduced by Representative Dingell. This amendment conformed the House provision to the Senate provision by defining market dominance as "an absence of effective competition from the carriers or modes of competition." In addition, the requirement that Commission rules be made in conjunction with DOT was dropped and the Commission was only required to consider the recommendations of the Secretary of DOT, the Attorney General, and the Federal Trade Commission. Finally, the Dingell revision contained the important language from the Senate Bill to the effect that the Commission rules implementing the market dominance provision "shall be designed to provide for a practical determination without administrative delay."¹⁹

¹⁹The market dominance provision as amended by Representative Dingell reads as follows:

(h) Following the promulgation and review of the initial standards established pursuant to subdivision (i), no rate shall be found unjust or unreasonable on the ground that it is too high unless the Commission determines that the common carrier by railroad charging the rate has market dominance. As used in this paragraph, the term "market dominance" refers to an absence of effective competition from other carriers or modes of competition. Market dominance shall be presumed in any situation in which (i) in any geographical market there are not at least 2 competing rail carriers or a rail carrier and an alternative mode of transportation both of which compete for the business in the area, or (ii) with respect to any single commodity or type of goods there is the absence of competition between the rail carriers for transport of that commodity, or where there is only one rail carrier, the absence of a competing mode which in fact provides transportation for that commodity in a reasonably effective and competitive fashion.

(i) Within 240 days after the date of enactment of the Railroad Revitalization and Regulatory Reform Act of 1975, the Commission shall establish, by rule, standards and procedures for determining whether and when a car-

[footnote continued]

H.R. 10979 was passed by the House on December 17, 1975, without any further amendment to the market dominance provision. It was then immediately considered by a Senate-House Conference.

In this first Conference which made its report on December 19, 1975, the Senate version of ratemaking reform largely prevailed:

Conference substitute

The conference substitute follows the Senate bill except that —

- (1) the conferees eliminated the provisions relating to a presumption of market dominance;
- (2) the conferees adopted a modified version of the House provision on rate zone freedom. The conference substitute provides that a rate may be increased or decreased up to 7 percent (for 2 years) without being suspended unless the rate is unlawful or predatory or the carrier has market dominance over the rate.
- (3) the conferees adopted a modified version of the House provision which requires any person seeking suspension to file an affidavit from which on its face, it appears that the complainant will be injured, and there are reasonable grounds for presuming that the rate will be found unlawful.²⁰

[footnote continued]

rier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rule shall be designed to provide for a practical determination without administrative delay. The Commission shall solicit and consider the recommendations of the Secretary, of the Attorney General, and of the Federal Trade Commission in the course of establishing such rules.

²⁰H.R. Rep. No. 94-768, 94th Cong., 1st Sess. (1975), at 122.

The bill as reported in the December 19 Conference Report was approved by both Houses on December 19, 1975, without any change in the market dominance provision. Nevertheless, the Christmas recess and a veto threat kept the bill from being enrolled and sent to the president.

In January 1976 the conferees met and worked out compromises, particularly in the area of funding, which made the bill acceptable to the President. Again the market dominance provision remained unchanged, but the new Report of the Committees of Conference on S.2718,²¹ elaborated on [sic] market dominance provision and specifically instructed the Commission to use a presumption relating to rate bureaus:

Conference substitute

Inasmuch as the new section 5b permits the consideration of rates free from the antitrust restrictions which would otherwise control competitive markets, the Committee of Conference intends that that [sic] there will be presumed to be an absence of effective competition between railroads with respect to any rate discussed or considered under an agreement approved by the Commission pursuant to new section 5b of the Interstate Commerce Act.***

The new Conference Report and Compromise Bill was approved by both houses and sent to the President, who signed it into law on February 5, 1976 as Public Law 94-210. [353 I.C.C. 940-947]

APPENDIX I**Ex Parte No. 320****SPECIAL PROCEDURES FOR MAKING FINDINGS
OF MARKET DOMINANCE AS REQUIRED BY
THE RAILROAD REVITALIZATION AND
REGULATORY REFORM ACT OF 1976**

Decided September 30, 1976

Upon further consideration, findings in prior report, served August 23, 1976, modified in some respects, otherwise affirmed and clarified.

Report of the Commission on Further Consideration**By the Commission:**

This proceeding was instituted in compliance with section 202 of the "Railroad Revitalization and Regulatory Reform Act of 1976."¹ In the interim report, served August 23, 1976, standards and procedures for making market dominance determinations were adopted subject to further comment by the parties. Thirty-seven additional comments have been received from the railroads, shippers, shipper interests, and Government agencies. Although the response to the interim report has been generally favorable, the parties have suggested various modifications in the rules, some of which have been adopted. Our revised rules incorporating these changes are set forth in full in appendix A. In addition, it appears that certain matters treated in the interim report require clarification.

Upon consideration of the comments of the parties, we are persuaded that a rebuttable presumption of market dominance where a rate exceeds 160 percent of variable cost will more ac-

¹Hereinafter, the 4R Act.

curately reflect the absence of effective competition.² Available evidence indicates that railroad fully allocated cost approximates 129 percent of variable cost.³ If an allowance is made for Federal income taxes and a reasonable profit level, a ratio of fully allocated costs to variable costs between 140 percent and 150 percent (including margin for error) would appear to be the highest level at which a rail carrier could be said to possesss only minimal market power. Where a rate exceeds 160 percent of variable cost, a rail carrier actually moving traffic thereunder will usually have substantial market power.

Some parties have argued that no single variable cost percentage can account for all cost levels which may vary significantly from commodity to commodity. The Department of Justice (Justice) notes that a higher percentage would be more appropriate for those movements which reflect higher ratios of fully allocated cost to variable cost. We believe that the use of a single average percentage figure presents less difficulty in application and would lead to more accurate determinations than the proposed alternatives. At the same time, we recognize that exceptional situations will exist where the particular ratio of fully allocated to variable cost may vary significantly from the average 129-percent figure. In these unusual instances, any party may show that the 160-percent figure would not reflect the actual costs of the traffic or movement in issue, and state the special circumstances which the Commission should consider. We believe this approach to be superior to the use of a variable percentage based on the commodity groups, which appears to be unwieldy and difficult to administer.⁴

²The presumption set out in the interim report would have become operative when a rate exceeded 180 percent of variable cost.

³See "Railroad Carload Cost Scales of 1973," Interstate Commerce Commission Bureau of Accounts, Statement No. 1C1-73, p. 150.

⁴The rail revenue contribution studies are based upon the carload waybill sample. See *Investigation of Railroad Frt. Rate Structure - Coal*, 345 I.C.C. 493, 534, where infirmities in the waybill study are discussed.

It must also be remembered that the standard set forth herein and in the interim report is not rigidly fixed. The Commission is presently in the process of complying with section 307 of the 4R Act in docket No. 36367, Revision to the Uniform System of Accounts for Railroads, 41 F.R. 33016, August 6, 1976. Standards adopted in that proceeding may result in the need for reformulation of this presumption at some future date. As with all other standards and procedures adopted herein, the Commission will continue to reassess their usefulness and accuracy in the light of actual experience.

We reiterate that a finding of market dominance based on the relationship of the rate in issue to the variable cost of the service does not necessarily imply that the rate is unjust or unreasonable. The market dominance test is merely a threshold determination to direct the Commission's attention to those situations in which competitive forces may be insufficient to insure just and reasonable rate levels.

Several minor changes in the language of the regulations have been adopted. Section 1109.1(a)(4) has been amended to provide that information should be submitted whenever the rate in issue has been docketed before a rate bureau. We agree with the contention of the Drug and Toilet Preparation Traffic Conference that analysis of the docketing procedure may better permit the Commission to determine the existence of tacit collusion where two or more similar rates are published under right of independent action at or about the same time.³ A new section 1109.1(a)(8) has been added to emphasize further that the railroads may produce any relevant evidence pertaining to the issue of market dominance. Section 1109.1(c) has been amended to make it clear that railroads and shippers alike are not required to produce information which cannot realistically be ob-

³However, we cannot agree with the contention that the rate bureau presumption should be triggered by mere publication of a rate by a rate bureau without evidence of docketing, discussion consideration, or approval of the rate at issue.

tained by them. We note that pleadings in a market dominance proceeding will be verified. In addition, the Commission will seek to ascertain that information alleged to be practicably unavailable is in fact unavailable.

Section 1109.1(d) has been amended to permit the complainant in any formal complaint proceeding in which the issue of market dominance is raised to file a reply to any verified answer to the complaint. Any such reply must be filed within 10 days of the due date for filing an answer, and must be limited to the issues relating to market dominance raised in the answer. This exception to the Commission's General Rules of Practice is justified in order to narrow the Commission's focus and permit these complex issues to be developed more fully. The narrower time constraints in proceedings to suspend a rate prevent any similar treatment there.

Finally, two minor changes have been made in the language of the presumptions to conform them to the intent of the Commission expressed herein and in the interim report. Section 1109.1(g)(1) has been amended to provide that any carrier which participates in the rate will have its market share included in any computation of the market share of the "proponent carrier." Section 1109.1(g)(3) has been amended to emphasize our intent that rail-related facilities be considered within the scope of the substantial investment presumption.

The first matter which requires clarification is the manner in which the presumption will be applied. The Department of Transportation (DOT) expressed the opinion that "where market dominance is proven under one or more tests, and effective competition under one or more of the others, the presumptions would effectively cancel one another out." This statement reflects a misunderstanding of the rules. As was noted in the prior report, the presumptions do not imply their converse.⁶ A

⁶Interim report, p. 20, 21.

protestant need establish only one presumption at which point the *burden of coming forward with evidence* of effective competition shifts to the proponent of the rate. Any relevant evidence of effective competition, as outlined in the interim report,⁷ can be offered to establish effective competition. This may be evidence which relates to one of the presumptions, or it may be other relevant evidence. Nevertheless, it should not be inferred that proof that a particular presumption does not apply necessarily rebuts any other presumption.

The railroads argue that the standards and procedures adopted herein result in an unauthorized shifting of the statutory burden of proof, insofar as they require the railroads to produce certain evidence in proceedings in which they do not have the burden of proof. They claim that such a result would violate the revised section 15(8)(d) of the Interstate Commerce Act.

A clear distinction should be drawn between the burden of proof in the sense of the burden of persuasion and the burden of producing evidence.⁸ The requirements contained herein impose on all parties the burden of producing certain available evidence in a limited number of situations in which they may not have the ultimate burden of persuasion. As we have pointed out in the interim report, the party best able to present particular evidence should do so in each proceeding in order to foster informed Commission decisions in all proceedings involving market dominance. However, the burden of persuasion at the suspension level remains on the protestant, who must affirmatively demonstrate the existence of market dominance. The burden of proof in any proceeding is merely the burden of persuading the finder of fact that the interpretation of evidence urged is correct. In all instances where the shipper has the statutory burden

⁷Interim report, p. 98-101.

⁸See, for example, rule 301 of the Federal Rules of Evidence. See also, McCormick, "Evidence" (1954), sections 306 and 307.

of proof, he must still persuade the Commission that the rail carrier's interpretation of the evidence adduced is not factually accurate. Even where the evidence would give rise to a rebuttable presumption, adequate explanation would lead to a finding that market dominance does not exist.

In view of the directive in section 12(1)(a) of the act that the Commission obtain from carriers any information necessary to execute and enforce the provisions of part I of the act, and in view of the necessity for this information, we are convinced that the railroads should be required to submit information to the Commission in the manner outlined in the interim report.

Several misconceptions have arisen regarding the operation of the rate bureau presumption contained in section 1109.1(f). Some of the parties have indicated that they do not understand the effect of the presumption. We state emphatically that rate bureau activity does not lead to a presumption of market dominance, per se. The effect of this presumption is to preclude those carriers which participate in a rate bureau published rate, or have discussed, considered, or approved that rate, from being considered effective competitors to the proponent rail carrier.⁹ In spite of rate bureau activity there may be effective competition from nonparticipating rail carriers, or carriers of other modes.

We cannot agree that this presumption should be made conclusive rather than rebuttable, nor can we agree with the contention that collusive price fixing is the only reason for the use of rate bureaus. Rate bureau procedures serve as a forum for ship-

⁹As indicated in the interim report, the presumption includes both formal and informal collective action. The presumption also includes discussions of such carrier groups as the Uniform Classification Committee, National Diversion and Reconsignment Committee, National Perishable Freight Committee, and AAR committees, some of which may not be subject to any specific procedures under section 5a or 5b agreement.

- ing September 30, 1981;
- (B) 165 percent during the period beginning October 1, 1981, and ending September 30, 1982;
- (C) 170 percent during the period beginning October 1, 1982, and ending September 30, 1983;
- (D) 175 percent or the cost recovery percentage, whichever is less, during the period beginning October 1, 1983, and ending September 30, 1984; and
- (E) the cost recovery percentage, during each 12-month period beginning on or after October 1, 1984.

For purposes of subparagraphs (D) and (E) of this paragraph, the cost recovery percentage shall in no event be less than a revenue-variable cost percentage of 170 percent or more than a revenue-variable cost percentage of 180 percent.

(3) For purposes of determining the revenue-variable cost percentage for a particular transportation, variable costs shall be determined pursuant to section 10705a(m)(1) of this title, with adjustments specified by the Commission. A rail carrier may meet its burden of proof under this subsection by establishing its variable costs in accordance with such section 10705a(m)(1), but a shipper may rebut that showing by evidence of such type, and in accordance with such burden of proof, as the Commission shall prescribe.

(4) A finding by the Commission that a rate charged by a rail carrier results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the applicable percentage under paragraph (2) of this subsection does not establish a presumption that (A) such rail carrier has or does not have market dominance over such transportation, or (B) the proposed rate exceeds or does not exceed a reasonable maximum.

(5)(A) Within 180 days after the effective date of the Staggers Rail Act of 1980 and on an annual basis thereafter, the Commission shall determine the cost recovery percentage for the transportation of all traffic received by rail carriers. The Commission shall make such determination after considering each individual revenue-variable cost percentage resulting from the revenues and costs of a valid and reliable statistical sample of all movements of commodities transported by class I rail carriers during the most recent calendar year for which such information is available.

(B) If, on the basis of calculations under subparagraph (A) of this paragraph, the Commission determines that revenues earned by all class I rail carriers during the previous calendar year do not exceed the fixed and variable costs of such carriers, then the cost recovery percentage for purposes of this section shall be deemed to be equal to the cost recovery percentage last determined by the Commission.

(C) The Commission shall, in its annual report submitted to the Congress under section 10311 of this title, set forth the cost recovery percentage determined for that year under subparagraph (A) of this paragraph.

Section 202(b) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 34-35 provided:

(b) Section 1(5) of the Interstate Commerce Act (49 U.S.C. 1(5)), as amended by subsection (a) of this section, is further amended by adding at the end thereof the following new subdivisions:

"(b) Each rate for any service rendered or to be rendered in the transportation of persons or property by any common carrier by railroad subject to this part shall be just and reasonable. A rate that is unjust or unreasonable is prohibited and unlawful. No rate which contributes or

pers to express their views concerning particular rate proposals and contribute to the publishing of rates responsive to shipper needs. Carrier foreknowledge of substantial shipper objections to a rate bureau docketed proposal will often permit informal settlements and prevent unnecessary litigation.

However, in view of the limited effect of the presumption and the strongly expressed congressional intent to afford the public either the protection of the antitrust laws or maximum-rate regulation, we believe it is appropriate that rebuttal of this presumption be limited to evidence that the assailed activity could not reasonably have had an anticompetitive effect.¹⁰ For example, this might entail a showing that committee or research group work was so narrow in scope that the action would not be prohibited by the antitrust laws.

While the effect of this presumption will ordinarily be limited to rail carriers, it should be pointed out that in instances where joint rates involving both rail carriers and carriers of other modes are in issue, the presumption will apply equally to those carriers of other modes which participate in the rate or any discussion, consideration, or approval of the rate.

DOT argues that the limited rate bureau presumption should be eliminated and that rate bureau activity is sufficiently covered in the market share presumption.¹¹ However, the many problems inherent in obtaining sufficient data to permit a workable market share test have been discussed at length in the interim report. For example, it may be very difficult to obtain

¹⁰With all other presumptions contained herein, rebuttal is not limited to the basic facts on which the presumption lies and may be accomplished by any evidence sufficient to show that effective competition exists.

¹¹This presumption provides that the market share of the proponent carrier shall be deemed to include the market share of carriers participating in rate bureau activities. See section 1109.01(g)(1).

data concerning the total share of the market held by all carriers participating in rate bureau activity,¹² and data on traffic handled by unregulated carriers may be unavailable. In such situations, the rate bureau presumption will remain an appropriate and necessary means of facilitating our market dominance determinations.

One other minor point has been raised regarding the application of the principal-agent test¹³ to rate bureau activity. As was noted in the interim report, the test will be applied only where a rate proposal receives no consideration or discussion other than by a rate bureau committee or research group, and the proponent carrier is not directly represented on the committee or group. In this narrow situation, our focus will concentrate on whether the committee or group is working on behalf of the proponent carrier or is conducting an independent study. In all standards and procedures adopted herein, our concern is with substance rather than form.

Several parties have noted that problems may arise from using traffic statistics based only on the previous year to determine market share. Data may not be representative because of unusual circumstances such as car shortages, strikes, embargoes, or unusually high demand. If a party believes that data derived from the prior year is not representative, it should explain the circumstances and present supporting data if possible. Where rates on new traffic are challenged and no prior statistics are available, the parties should indicate any carriers which they believe will be able to handle the traffic.

Several parties have raised questions concerning our treatment of evidence of private carriage.¹⁴ The railroads and the Federal Trade Commission (FTC) argue that private carriage has a

¹²For this reason, we have indicated in the interim report (p. 93) that estimates may be used in this one instance only, *provided* that adequate explanation of the basis for such estimates is also provided.

¹³See p. 27, interim report.

¹⁴Interim report, p. 61.

significant impact upon rail rates and that it should be included in market share calculations, while Justice and DOT also indicate that private carriage should be considered in some manner. In the discussion of the market share test in the previous report we stated that the existence of private carriage cannot be given the same consideration as traffic moving for-hire because private carriage does not have the same competitive impact.¹³ The market share test is based on the proposition that if a railroad's competitors are already handling 30 percent or more of the traffic, the competitive service is likely to be a commercially feasible alternative. The essential problems with considering private carriage are that the private fleet of one firm does not compete for the traffic or movements of another and that the cost to the shipper of transfer to private carriage is frequently prohibitive. Thus, the carrier who raises its rates risks losing only the traffic of those shippers who are in a position to use private carriage. Therefore, we conclude that private carriage should not be included in the calculation of market share.

Justice has suggested an alternative approach. It believes that private carriage can provide effective competition where those firms capable of establishing private carriage account for a significant fraction of the goods moving under a rate in issue. We agree that where a substantial amount of the traffic moving under the rate in issue is tendered by shippers who are currently using private carriage there is a potential for diversion sufficient to prevent carriers from taking unreasonable rate increases. On the other hand, if the traffic accounted for by shippers also using private carriage is small, this factor is not likely to have a significant impact on ratemaking. Thus if the Commission is to assess the impact of private carriage in a particular situation it is essential to know (1) which shippers are using private carriage, (2) the percentage of the traffic moving under the rate in issue which is accounted for by the shippers, (3) the extent to which

¹³*Id.*

they use private carriage, and (4) whether the cost of further use of private carriage would be prohibitive. We conclude that private carriage should be considered as rebuttal evidence where the proponent demonstrates that private carriage currently has a significant impact on carrier ratemaking.

Several questions have been raised regarding what investments would qualify under the rail-related equipment presumption. This would include shipper investment in loading and unloading facilities, railcars, rail siding, loop tracks, and any other facilities which are dedicated to rail transportation.

Justice has argued that rolling stock should not necessarily be treated as a fixed investment which makes shippers captive, because cars can often be sold with little or no capital loss. Certainly the marketability of the equipment or facilities is an important factor in determining whether use of the services of another mode would be impossible or highly impractical.

DOT has made the following observation with regard to this presumption:

If fifty percent of the shippers affected by a proposed rate are free to move to another mode, it is unlikely that the railroad would raise its rate so high as to force them to do so. Such pricing by the railroads would result not only in the immediate loss of fifty percent of the traffic, but would also cause the fifty percent with substantial investments not to reinvest once the original facilities wore out.

Essentially, this position is consistent with the statement in the interim report that the presumption can be rebutted by a showing that the preponderance of the traffic in terms of volume is tendered by shippers who have not made substantial investments in rail-related equipment.¹⁶ Here the rail carrier is in the best position to supply this aggregate tonnage data which relates to the traffic of its own customers.

Another question which was raised in the comments is whether the presumption relating to investment in rail-related

¹⁶Interim report, pp. 77-78.

equipment made in the future should be included in the presumption. DOT and Justice believe that the revised section 15(19) of the act provides adequate rate protection for shippers in these situations. This section is applicable only if the rates are filed on 180 days' notice,¹⁷ pursuant to a special procedure. A finding under section 15(19) and the proposed procedures is optional because a carrier may always elect to file the rate under section 15(8), subject to normal investigation and suspension-procedures.¹⁸

Moreover, section 15(19) relates only to situations where the investment in question exceeds \$1 million. An investment may be substantial to a relatively small shipper despite the fact that it does not exceed a particular dollar amount. What is more relevant in the context of market dominance is the size of the investment in relation to the shippers' total production and transportation costs, and the cost and time which would be involved in preparing to use the services of another mode. These are the factors which will be considered in determining the extent to which these investments make it impossible or highly impractical for shippers to take advantage of services offered by other modes.

Finally, we wish to stress once more that the presumptions adopted herein are not the exclusive means of proving market dominance. If a preponderance of any other relevant evidence¹⁹ indicates that effective competition for the traffic or movement to which the rate applies does not exist, a finding of market

¹⁷The proposed procedures are set forth in the Notice of Proposed Rulemaking in Ex Parte No. 327, Rate Incentives for Capital Investment, served July 29, 1976.

¹⁸Rates qualifying under the new capital incentive section may not be suspended or set aside as unlawful under section 2, 3, or 4 of the act. Essentially this protects shippers and carriers alike against a finding by the Commission that the tariff prefers or discriminates in favor of the shipper taking the rate as opposed to other shippers.

¹⁹See interim report, pp. 98-102.

dominance will be made. All relevant evidence presented by both sides will be given full consideration.

As experience is gained in the implementation of the concept of market dominance, refinements, and modifications may be required. Accordingly, this proceeding will remain open so that parties and other concerned persons may petition for any changes they believe are necessary. The continuing nature of this proceeding will permit reevaluation of the various standards and procedures, based upon actual experience. The Commission will continue its effort to achieve the sensitive balance between the need for rail carriers to be relieved from rate regulation in competitive markets and the need of the public to be protected from unwarranted rate increases where competition will not insure such protection, in accordance with the intent of Congress. It is the Commission's purpose to implement the congressional statement of policy in Public Law 94-210 to provide for ratemaking reform, to give rail carriers greater freedom to raise and lower rates without Commission intervention, and to foster competition among railroads and between the railroads and the other modes of carriage.

All discussion and conclusions contained in the interim report, to the extent not modified herein, are hereby incorporated by reference into this report.

Findings

We find that implementation of the standards and procedures contained herein would enable the Commission to make prompt determinations as to market dominance without undue delay, in accordance with the congressional intent expressed by section 202 of the Rail Revitalization and Regulatory Reform Act of 1976.

We further find that the proposed rules set out in appendix A are sound, equitable, reasonable, and necessary, and should be adopted as specified in the attached order.

And we further find that this is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

Commissioner Corber, concurring:

Although my concurring expression in the interim report suggested a rationale for establishing the point of activation of the third presumption at 50 percent in excess of variable costs rather than 80 percent, I am not in disagreement with the 60-percent figure prescribed in the report and order on further consideration. The stated basis for the 60-percent trigger is more soundly grounded than the one for 80 percent. Moreover, we are at the very beginning of our experience with the market dominance concept and an approach reasonably weighted toward rate flexibility is consistent with the intent of the 4R Act. In this connection I note with approval that the presumption is not to be taken as rigidly fixed and that it will be reassessed on the basis of experience. There are recognized infirmities in existing cost figures which support the use of a percentage leaving ample room for error. As the accounting systems of the carriers, as well as those prescribed by the Commission, improve there will be better data with which to improve the accuracy of this presumption. Finally, I reemphasize what I stated in regard to the interim report, that the presumption does not determine the justness or reasonableness of any rate. It merely indicates the rates which must be scrutinized in accordance with the usual tests for justness and reasonableness.

APPENDIX A

PART 1109 REQUIREMENTS AND PROCEDURES RELATING TO THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976

§1109.1 Requirements and Procedures Relating to a Determination of Market Dominance with Regard to Rates Challenged as

Unreasonably High.¹

(a) In order that the Commission may determine whether a rail carrier proposing a rate increase possesses market dominance over the service to be rendered under a proposed rate, there shall be included in the carrier's statement notifying the Commission that it wishes to have the proposed rate considered pursuant to section 15(8)(c) of the Interstate Commerce Act, evidence upon which the Commission may base a determination with regard to market dominance, to the extent available, and including but not limited to the following information: (1) descriptions of involved commodities and full seven-digit STCC number(s); (2) descriptions of involved points or areas and mileage(s), stated in terms of short line mileage by rail; (3) the variable cost of the service to which the rate applies; (4) whether and to what extent the rate in issue has been docketed, discussed, considered, or approved before a rate bureau acting under an agreement filed with and approved by the Commission pursuant to section 5a or 5b of the Interstate Commerce Act; application number(s), date proposal docketed with rate bureau, and final disposition of proposal and date thereof; and the share of the market, or an estimate thereof, presently held by such participating carriers; (5) tonnage of the involved traffic transported between the involved points or areas by the proponent carrier and its affiliates during the preceding year, and the rates charged therefor during the same time period; (6) names of any known originating for-hire carriers of any mode offering interchangeable service between the involved points or areas, the tonnage transported and the rates charged therefor during the preceding year; (7) the extent to which the proponent rail carrier has taken general increases approved by the Commission in the preceding 2 years; (8) any other relevant information.

(b) In all proceedings involving a request for suspension of a proposed rate on the ground that it is unreasonably high there shall be included in the verified complaint seeking suspension of

¹As used in this section, the term rates includes fares and charges.

the schedule containing the proposed rate,² evidence upon which the Commission may base a determination with regard to market dominance, including the information outlined in subparagraphs (a)(1)-(7), to the extent available and not previously furnished by the rail carriers, and including but not limited to the following information: (1) characteristics of the involved traffic or movement affecting the ease or difficulty with which transportation services of other carriers or modes may be substituted for the service to be performed under the rate in issue; (2) tonnage of the involved traffic transported between the involved points or areas by any known for-hire carriers, other than those in subparagraph (a)(5), during the preceding year, and the rates charged therefor during the same time period; (3) any other relevant information.

(c) Any reply to a verified complaint seeking suspension should contain any information required by §1109.1(a) and (b), to the extent not previously furnished by complainant. Whether or not a reply to a verified complaint seeking suspension is filed, the proponent rail carrier on or before the due date for filing a reply, must provide the Commission with the information required by §1109.1(a) to the extent available and not previously submitted by another party.

(d) A formal complaint containing an allegation that an existing rail rate is unreasonably high shall contain verified evidence upon which the Commission may base a determination with regard to market dominance, including, to the extent available, the information outlined in §1109.1(a) and (b). The answer to a formal complaint shall be verified and shall contain the information outlined in §1109.1(a) to the extent not previously furnished. Replies limited to the issues of market dominance raised by any verified answer, may be filed within 10 days of the due date for the filing of such answer.

²Section 15(8)(d) of the Interstate Commerce Act as amended requires that complainants [sic] seeking suspension of a proposed rate be verified. See 49 CFR 1100.42(f).

(e) Upon notification of a proceeding instituted upon the Commission's own initiative to investigate whether an existing or proposed rate is unreasonably high, the interested carrier or carrier shall file, within 20 days from the service date of the order instituting said investigation, a verified statement containing, to the extent available and if not previously furnished by the carrier(s), evidence upon which a market dominance determination may be based, including but not limited to the information outlined in §1109.1(a) and (b). Replies, if any, directed to the issue of market dominance, should be filed within 20 days of the date for the filing of the carrier statement.

(f) In a proceeding involving a determination as to market dominance wherein the evidence adduced establishes that the rate in issue has been discussed, considered, or approved under a rate bureau agreement filed with the Commission pursuant to section 5a or 5b of the Interstate Commerce Act, a rebuttable presumption will arise that a carrier participating in the rate or in such discussion or consideration does not provide effective competition to the proponent rail carrier for the involved traffic or movement.

(g) In a proceeding involving a determination as to market dominance wherein the evidence adduced establishes one of the following situations, a rebuttable presumption that the carrier whose rate is in issue has market dominance over the involved traffic or movement will arise: (1) where the proponent carrier has handled 70 percent or more of the involved traffic or movement during the preceding year; the market share of the proponent will be deemed to include the share of any affiliates, and of any carrier participating in the rate or with whom the proponent carrier has discussed, considered, or approved the rate in issue; (2) where the rate in issue exceeds the variable cost of providing the service by 60 percent or more; and, (3) where affected shippers or consignees have made a substantial investment in rail-related equipment or facilities which prevents or makes impractical the use of another carrier or mode.

STATUTORY APPENDIX

The Interstate Commerce Act, codified at 49 U.S.C. § 10709 (Supp. V 1981), provides:

(a) In this section, "market dominance" means an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies.

(b) When a rate for transportation by a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title is challenged as being unreasonably high, the Commission shall determine, within 90 days after the start of a proceeding under section 10707 of this title to investigate the lawfulness of that rate, whether the carrier proposing the rate has market dominance over the transportation to which the rate applies. The Commission may make that determination on its own initiative or on complaint. A finding by the Commission that the carrier does not have market dominance is determinative in a proceeding under this subtitle related to that rate or transportation unless changed or set aside by the Commission or set aside by a court of competent jurisdiction.

(c) When the Commission finds in any proceeding that a rail carrier proposing or defending a rate for transportation has market dominance over the transportation to which the rate applies, it may then determine that rate to be unreasonable if it exceeds a reasonable maximum for that transportation. However, a finding of market dominance does not establish a presumption that the proposed rate exceeds a reasonable maximum. This subsection does not limit the power of the Commission to suspend a rate under section 10707(c) of this title. However, if the Commission has found that a carrier does not have market dominance over the transportation to which the rate ap-

plies, the Commission may suspend an increase in that rate as being in excess of a reasonable maximum for that transportation only if it specifically changes or sets aside its prior determination of market dominance.

(d)(1) In this subsection —

(A) "fixed and variable cost" means all cost incurred by rail carriers in the transportation of freight, but limiting the return on equity capital to a rate equal to the embedded cost of debt.

(B)(i) "cost recovery percentage" means the lowest revenue-variable cost percentage which, if all movements that produced revenues resulting in revenue-variable cost percentages in excess of the cost recovery percentage are deemed to have produced only revenues resulting in the cost recovery percentage, would produce revenues which would be equal, when combined with total revenues produced by all other traffic transported by rail carrier, to the total fixed and variable cost of the transportation of all traffic by rail carrier.

(ii) for purposes of determining the cost recovery percentage only, "revenue-variable cost percentage" means the quotient, expressed as a percentage figure, obtained by dividing the total revenues produced by the transportation of all traffic received by rail carriers for rail transportation by the total variable cost of such transportation.

(2) In making a determination under this section, the Commission shall find that the rail carrier establishing the challenged rate does not have market dominance over the transportation to which the rate applies if such rail carrier proves that the rate charged results in a revenue-variable cost percentage for such transportation that is less than —

(A) 160 percent during the period beginning on the effective date of the Staggers Rail Act of 1980 and end-

which would contribute to the going concern value of such a carrier shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate is below a just or reasonable minimum for the service rendered or to be rendered. A rate which equals or exceeds the variable costs (as determined through formulas prescribed by the Commission) of providing a service shall be presumed, unless such presumption is rebutted by clear and convincing evidence, to contribute to the going concern value of the carrier or carriers proposing such rate (hereafter in this paragraph referred to as the 'proponent carrier'). In determining variable costs, the Commission shall, at the request of the carrier proposing the rate, determine only those costs of the carrier proposing the rate and only those costs of the specific service in question, except where such specific data and cost information is not available. The Commission shall not include in variable cost any expenses which do not vary directly with the level of service provided under the rate in question. Notwithstanding any other provision of this part, no rate shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate exceeds a just or reasonable maximum for the service rendered or to be rendered, unless the Commission has first found that the proponent carrier has market dominance over such service. A finding that a carrier has market dominance over a service shall not create a presumption that the rate or rates for such service exceed a just and reasonable maximum. Nothing in this paragraph shall prohibit a rate increase from a level which reduces the going concern value of the proponent carrier to a level which contributes to such going concern value and is otherwise just and reasonable. For the purposes of the preceding sentence, a rate increase which does not raise a rate above the incremental costs (as determined through formulas prescribed by the Commission) of rendering the service to which such rate applies

shall be presumed to be just and reasonable.

"(c) As used in this part, the terms—

"(i) 'market dominance' refers to an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies; and

"(ii) 'rate' means any rate or charge for the transportation of persons or property.

"(d) Within 240 days after the date of enactment of this subdivision, the Commission shall establish, by rule, standards and procedures for determining, in accordance with section 15(9) of this part, whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rules shall be designed to provide for a practical determination without administrative delay. The Commission shall solicit and consider the recommendations of the Attorney General and of the Federal Trade Commission in the course of establishing such rules."

The Interstate Commerce Act was revised and codified as Subtitle IV of title 49 of the United States Code by Act of October 13, 1978, Pub. L. No. 95-473, 92 Stat. 1337. Section 3(a) of the Act of October 13, 1978 provided:

(a) Sections 1 [enactment of the Interstate Commerce Act as subtitle IV of title 49 of the United States Code] and 2 [conforming and technical provisions] of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced. Laws enacted after May 15, 1978, that are inconsistent with this Act are considered as superseding it to the extent of the inconsistency.

The Interstate Commerce Act, as revised by Section 1 of the Act of October 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337, 1382-83, codified at 49 U.S.C. § 10709 provided:

- (a) In this section, "market dominance" means an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies.
- (b) When a rate for transportation by a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title is challenged as being unreasonably high, the Commission shall determine, within 90 days after the start of a proceeding under section 10707 of this title to investigate the lawfulness of that rate, whether the carrier proposing the rate has market dominance over the transportation to which the rate applies. The Commission may make that determination on its own initiative or on complaint. A finding by the Commission that the carrier does not have market dominance is determinative in a proceeding under this subtitle related to that rate or transportation unless changed or set aside by the Commission or set aside by a court of competent jurisdiction.
- (c) When the Commission finds in any proceeding that a rail carrier proposing or defending a rate for transportation has market dominance over the transportation to which the rate applies, it may then determine that rate to be unreasonable if it exceeds a reasonable maximum for that transportation. However, a finding of market dominance does not establish a presumption that the proposed rate exceeds a reasonable maximum. This subsection does not limit the power of the Commission to suspend a rate under section 10707(c) of this title. However, if the Commission has found that a carrier does not have market dominance over the transportation to which the rate applies, the Commission may suspend an increase in that rate as being in excess of a reasonable maximum for that transportation only if it specifically changes or sets aside its prior determination of market dominance.

Section 202 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, 1900-01 provides:

SEC. 202. Section 10709 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:

"(d)(1) In this subsection—

"(A) 'fixed and variable cost' means all cost incurred by rail carriers in the transportation of freight, but limiting the return on equity capital to a rate equal to the embedded cost of debt.

"(B)(i) 'cost recovery percentage' means the lowest revenue-variable cost percentage which, if all movements that produced revenues resulting in revenue-variable cost percentages in excess of the cost recovery percentage are deemed to have produced only revenues resulting in the cost recovery percentage, would produce revenues which would be equal, when combined with total revenues produced by all other traffic transported by rail carrier, to the total fixed and variable cost of the transportation of all traffic by rail carrier.

"(ii) for purposes of determining the cost recovery percentage only, 'revenue-variable cost percentage' means the quotient, expressed as a percentage figure, obtained by dividing the total revenues produced by the transportation of all traffic received by rail carriers for rail transportation by the total variable cost of such transportation.

"(2) In making a determination under this section, the Commission shall find that the rail carrier establishing the challenged rate does not have market dominance over the transportation to which the rate applies if such rail carrier proves that the rate charged results in a revenue-variable cost percentage for such transportation that is less than—

"(A) 160 percent during the period beginning on the effective date of the Staggers Rail Act of 1980 and end-

ing September 30, 1981;

"(B) 165 percent during the period beginning October 1, 1981, and ending September 30, 1982;

"(C) 170 percent during the period beginning October 1, 1982, and ending September 30, 1983;

"(D) 175 percent or the cost recovery percentage, whichever is less, during the period beginning October 1, 1983, and ending September 30, 1984; and

"(E) the cost recovery percentage, during each 12-month period beginning on or after October 1, 1984.

For purposes of subparagraphs (D) and (E) of this paragraph, the cost recovery percentage shall in no event be less than a revenue-variable cost percentage of 170 percent or more than a revenue-variable cost percentage of 180 percent.

"(3) For purposes of determining the venue-variable cost percentage for a particular transportation, variable costs shall be determined pursuant to section 10705a(m)(1) of this title, with adjustments specified by the Commission. A rail carrier may meet its burden of proof under this subsection by establishing its variable costs in accordance with such section 10705a(m)(1), but a shipper may rebut that showing by evidence of such type, and in accordance with such burden of proof, as the Commission shall prescribe.

"(4) A finding by the Commission that a rate charged by a rail carrier results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the applicable percentage under paragraph (2) of this subsection does not establish a presumption that (A) such rail carrier has or does not have market dominance over such transportation, or (B) the proposed rate exceeds or does not exceed a reasonable maximum.

"(5)(A) Within 180 days after the effective date of the Staggers Rail Act of 1980 and on an annual basis thereafter, the Commission shall determine the cost recovery percentage for the transportation of all traffic received by rail carriers. The Commission shall make such determination after considering each individual revenue-variable cost percentage resulting from the revenues and costs of a valid and reliable statistical sample of all movements of commodities transported by class I rail carriers during the most recent calendar year for which such information is available.

"(B) If, on the basis of calculations under subparagraph (A) of this paragraph, the Commission determines that revenues earned by all classes I rail carriers during the previous calendar year do not exceed the fixed and variable costs of such carriers, then the cost recovery percentage for purposes of this section shall be deemed to be equal to the cost recovery percentage last determined by the Commission.

"(C) The Commission shall, in its annual report submitted to the Congress under section 10311 of this title, set forth the cost recovery percentage determined for that year under subparagraph (A) of this paragraph."

Section 205 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, 1905-06 provides:

Sec. 205. (a)(1). The Interstate Commerce Commission shall commence a proceeding for purposes of determining whether, and to what extent, product competition should be considered in proceedings under subtitle IV of title 49, United States Code, to determine the reasonableness of rail carrier rates. The Commission shall complete its proceeding under this subsection within 230 days after the effective date of this Act.

(2)(A) For purposes of this subsection, the term "product competition" means the availability to a consignee, at a

competitive delivered cost and in sufficient quantities, of products or commodities which are of the same type as the commodity or product to which the rate in question applies, without regard to whether such products or commodities are available from the same or a different origin as those to which the rate applies.

(B) In determining the availability of alternative sources of a particular commodity for purposes of this subsection, such commodity must be capable, by reason of similar specifications, of being effectively utilized by the consignee.

(C) In determining the availability of alternative sources of coal for purposes of this subsection, such coal must be capable, by reason of similar specifications such as Btu's, sulfur content, and ash content, of being effectively utilized by the consignee.

(D) For purposes of this subsection, any coal imported in the United States for the generation of electricity by utilities shall not be taken into account in the determination of whether coal is available to a consignee from another source.

(3)(A) Nothing in this subsection shall be construed as requiring the Commission to modify its standards for the determination of the reasonableness of rail carrier rates under existing law and procedures.

(B) Nothing in this subsection shall be construed as altering the meaning, use, or interpretation by the Commission, the courts, or any party of the term "market dominance", as defined in section 10709(a) of title 49, United States Code. The enactment of this subsection shall not be considered by the Commission in any proceeding, or by any court on an appeal from that or any other proceeding, to determine the proper scope of the term "market dominance" or whether there is market dominance over the transportation to which any particular rate applies.

(b)(1) Section 10704(a)(2) of title 49, United States Code, is amended by inserting "and revise as necessary" immediately after "shall maintain".

(2) Section 10704(a) of title 49, United States Code, is amended by adding at the end thereof the following new paragraphs:

"(3) The Commission shall conclude a proceeding under paragraph (2) of this subsection within 180 days after the effective date of the Staggers Rail Act of 1980 and thereafter as necessary.

"(4) On the basis of the standards and procedures under paragraph (2) of this subsection, the Commission shall, within 180 days after the effective date of the Staggers Rail Act of 1980 and on an annual basis thereafter, determine which rail carriers are earning adequate revenues.".

The Interstate Commerce Act, codified at 49 U.S.C. §10701a (b)(1) (Supp. V 1981), provides:

(b)(1) If the Commission determines, under section 10709 of this title, that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable.

FILED
MAR 29 1984

No. 83-1341

ALEXANDER L. STEVENS.

In the Supreme Court of the United States
OCTOBER TERM, 1983

WESTERN COAL TRAFFIC LEAGUE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOHN BROADLEY
General Counsel

HENRI F. RUSH
Associate General Counsel

TIMM L. ABENDROTH
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

QUESTION PRESENTED

Whether the court of appeals properly upheld the Interstate Commerce Commission's rule allowing it to consider evidence of indirect forms of competition—product and geographic competition—in deciding whether a railroad has market dominance, which is a jurisdictional prerequisite to the Commission's authority to rule on the reasonableness of the rail carrier's rates under 49 U.S.C. (Supp. V) 10709(a).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	16

TABLE OF AUTHORITIES

Cases:

<i>American Trucking Ass'n v. Atchison, T. & S.F. Ry.</i> , 387 U.S. 397	11, 14
<i>Atchison, T. & S.F. Ry. v. ICC</i> , 580 F.2d 621	3
<i>Batterton v. Francis</i> , 432 U.S. 416	14
<i>Central Power & Light Co. v. United States</i> , 634 F.2d 137, cert. denied, 454 U.S. 831	3, 4-5
<i>FCC v. National Citizens Comm. for Broadcasting</i> , 436 U.S. 775	15
<i>FCC v. WNCN Listeners Guild</i> , 450 U.S. 582.....	14
<i>FEC v. Democratic Senatorial Campaign Comm.</i> , 454 U.S. 27	14
<i>Incentive Rates on Coal—Axial, Co. to Coleto Creek, TX</i> , 362 I.C.C. 572	12
<i>United States v. Tucker Truck Lines</i> , 344 U.S. 33..	11
<i>NLRB v. Hearst Publications</i> , 322 U.S. 111	14
<i>Regional Rail Reorganization Act Cases</i> , 419 U.S. 102	10, 11

Statutes:

Interstate Commerce Act, 49 U.S.C. (Supp. V) 10101 <i>et seq.</i> :	
49 U.S.C. (Supp. V) 10501	2
49 U.S.C. (Supp. V) 10709(a)	2
49 U.S.C. (Supp. V) 10709(b)	2
49 U.S.C. (Supp. V) 10709(c)	2
49 U.S.C. (Supp. V) 10709(d)(2)	5

Statutes—Continued:	Page
Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 <i>et seq.</i> :	
§ 202(b), 90 Stat. 35 (formerly codified at 49 U.S.C. 1(5)(d))	2, 9, 10, 11
§ 202(c)	11
Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 <i>et seq.</i>	5
§ 205, 94 Stat. 1905	12
§ 205(a)(3)(B), 94 Stat. 1906	12
Pub. L. No. 95-473, 92 Stat. 1337 <i>et seq.</i>	2
§ 4(b), 92 Stat. 1466	2, 11
§ 4(b), 92 Stat. 1466-1470	10-11
Miscellaneous:	
45 Fed. Reg. 3353 (1980)	4
<i>House Subcomm. on Oversight and Investigations of the Comm. on Interstate and Foreign Commerce</i> , 96th Cong., 2d Sess., <i>Report on Railroad Coal Rates and Public Participation: Oversight of ICC Decision Making</i> (Comm. Print 96-IFC 1980)	5-6
H.R. 7235, 96th Cong., 2d Sess. (1980)	11
H.R. Rep. 94-781, 94th Cong., 2d Sess. (1976)	2
H.R. Rep. 96-1035, 96th Cong., 2d Sess. (1980)	5, 12
H.R. Rep. 96-1430, 96th Cong., 2d Sess. (1980)	6, 11
A. Kearney, <i>A Study to Perform an In-Depth Analysis of Market Dominance and its Relationship to Other Provisions of the 4-R Act</i> (1979)	5
S. Rep. 94-499, 94th Cong., 1st Sess. (1975)	2, 10
<i>Special Procedures for Findings of Market Dominance, Ex parte</i> No. 320, 359 I.C.C. 735	4, 10

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1341

WESTERN COAL TRAFFIC LEAGUE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals sitting *en banc* (Pet. App. A1-A22) is reported at 719 F.2d 772. The original panel opinion of the court of appeals (Pet. App. C1-C35) is reported at 694 F.2d 378. The decision of the Interstate Commerce Commission (Pet. App. D1-D24) is reported at 365 I.C.C. 118.

JURISDICTION

The judgment of the court of appeals (Pet. App. G1-G2) was entered on November 14, 1983. The pe-

tion for a writ of certiorari was filed on February 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since 1976, the Interstate Commerce Commission's (ICC) historic power to regulate railroad rates under the Interstate Commerce Act, 49 U.S.C. (Supp. V) 10501, 10709(b) and (c), has been confined to situations where the railroad possesses "market dominance," a term statutorily defined as "an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies" (49 U.S.C. (Supp. V) 10709(a)).¹ The market dominance provision was a key part of Congress's effort in the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act) (Pub. L. No. 94-210, 90 Stat. 31 *et seq.*) to allow railroads greater regulatory freedom in contexts where competitive market forces would protect the shipping public from unreasonably high railroad rates.² Congress directed the Commission, after consulting with the Attorney General and the Federal Trade Commission, to implement the new jurisdictional limit by establishing practical standards and procedures for determining whether a carrier possesses market dominance. Section 202(b) of the 4R Act, 90 Stat. 35.

¹ As originally enacted the definition referred to "an absence of effective competition * * * for the traffic or movement." In recodifying and simplifying the Interstate Commerce Act in 1978, 92 Stat. 1837 *et seq.*, Congress changed the phrase "traffic or movement" to "transportation." Congress stated that no substantive change was intended by that or any other changes in the law. (§ 4(b), 92 Stat. 1466).

² See S. Rep. 94-499, 94th Cong., 1st Sess. 47 (1975); H.R. Rep. 94-781, 94th Cong., 2d Sess. 148 (1976).

In its original decision implementing the market dominance requirement, the ICC adopted, over the objection of the Department of Justice and the FTC, a rule that precluded it from considering evidence of indirect forms of competition (Pet. App. H1-H28).³ The ICC's primary reason for excluding this evidence was that it would unduly complicate the Commission's rate review process (Pet. App. H9-H12). On judicial review of the Commission's original regulations, the Department of Justice and others challenged the Commission's interpretation of market dominance, but the court of appeals sustained the Commission's interpretation. *Atchison, T. & S.F. Ry. v. ICC*, 580 F.2d 623 (D.C. Cir. 1978). The court did not hold that the ICC's interpretation was "the correct" one. Instead, the court held that there was a "sufficient basis in the statutory language and purpose to merit our deferral to the Commission's view" (*id.* at 634).⁴

³ Geographic competition in the railroad industry refers to the situation where the shipper can obtain the same product from an alternate source, using a different carrier (e.g., another railroad, or a truck or barge), or can ship the same product to a different destination, again using another carrier. "Product competition" means that a shipper can use a substitute product carried by a different carrier (Pet. App. A2 n.5).

⁴ The court noted (580 F.2d at 634) that the Commission's interpretation of the statutory language "may appear to some as an attempt to attribute excessive significance to a terse statutory clause," but nevertheless the court deferred to the Commission's view. The court observed that the Commission's rules were only a "first cut" subject to reexamination in light of experience (*id.* at 630, 640). See also *Central Power & Light Co. v. United States*, 634 F.2d 187, 173 n.72 (5th Cir. 1980), cert. denied, 454 U.S. 831 (1981).

2. In 1979, the ICC announced a change of position on the market dominance issue. In a decision responding to a limited remand from the court of appeals on an unrelated issue, the Commission advised the court that it was evaluating further its definition of market dominance "in light of the experience gained in the 28 months since we promulgated our regulations." *Special Procedures for Findings of Market Dominance, Ex parte* No. 320, 359 I.C.C. 735 (1979). As part of that analysis, the Commission concluded that evidence of geographic and product competition was relevant and would be admissible in rebuttal where shippers had already established a presumption of market dominance based on other evidence. Thereafter, the Commission proposed new market dominance regulations, which explicitly invited interested parties to submit evidence of geographic and product competition. 45 Fed. Reg. 3353 (1980).⁵ In practice, since at least 1979, the Commission has consistently considered evidence of both forms of competition in making a market dominance determination.⁶

⁵ Those proposed regulations turned out in some respects (not relevant here) to be in conflict with the market dominance provisions of the subsequently enacted Staggers Rail Act of 1980. Consequently, the Commission withdrew that proposal and issued new regulations in its Sub-No. 2 proceeding which is here under review (Pet. App. D20-D24).

⁶ In one case, the Commission dismissed a complaint based on a finding of effective geographic competition, but its decision was remanded. See *Central Power & Light Co. v. United States*, *supra*. The court found the Commission's consideration of geographic competition to be inconsistent with its original decision excluding such evidence and remanded to the Commission for further explanation of the reasons for its

3. In response to the continuing economic plight of the railroad industry and criticism that the ICC's implementation of the 4R Act, including its "market dominance" test, had freed very little rail traffic from rate regulation,⁷ Congress considered further reforms. Included among the proposals was one to replace the market dominance provision enacted in the 4R Act with detailed statutory criteria, requiring the Commission to consider, among other things, geographic competition. See H.R. Rep. 96-1035, 96th Cong., 2d Sess. 4-5, 38-40 (1980). When Congress enacted the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 *et seq.*, it decided instead to retain the 4R Act's market dominance provision, and supplement it with a new provision that automatically deregulated rail rates below a certain revenue-to-variable cost ratio. 49 U.S.C. (Supp. V) 10709 (d)(2).⁸

departure from its prior interpretation. The court expressly declined, however, to preclude the Commission on remand from adopting an interpretation of market dominance that included consideration of geographic competition. 634 F.2d at 172-175.

⁷ A report issued in late 1979 by consultants retained by the Commission to study the effectiveness of its market dominance regulations concluded that very little rail traffic (under 5% long term, 10-15% short term) was market dominant if all transportation alternatives were properly considered. A. Kearney, *A Study to Perform an In-Depth Analysis of Market Dominance and its Relationship to Other Provisions of the 4-R Act* (1979). A House Committee found that the Commission's regulations exempted less than 30% of railroad traffic from rate regulation. See H.R. Rep. 96-1035, 96th Cong., 2d Sess. 38 (1980).

⁸ Despite the report of an oversight committee criticizing the Commission's consideration of geographic and product competition under the 4R Act, *House Subcomm. on Oversight and Investigations of the Comm. on Interstate and Foreign Commerce, 96th Cong., 2d Sess., Report on Railroad Coal*

4. Following enactment of the Staggers Act, the Commission adopted new market dominance regulations (Pet. App. D1-D24). The Commission approved new evidentiary guidelines that explicitly permit introduction of evidence of geographic and product competition (Pet. App. D20-D24). The Commission explained that it was reversing its prior decision on this issue, because the original interpretation of the statute was unnecessarily restrictive; the language of the statute readily embraces indirect competition, and nothing in the 4R Act indicated a Congressional intent that the Commission should consider only "direct" competition (Pet. App. D15-D16). The Commission also addressed the issue of administrative feasibility, stating that it no longer believed it appropriate to ignore relevant evidence, and that with appropriate guidelines evaluation of the evidence should be manageable in most cases (*id.* at D18).

A divided panel of the court of appeals set aside the Commission's new regulations (Pet. App. C1-

Rates and Public Participation: Oversight of ICC Decision Making (Comm. Print 96-IFC 1980), Congress did not restrict the Commission's power to set standards for market dominance. Instead, the final conference report on the Staggers Act emphasized the ICC's continuing responsibility to administer the market dominance provision to achieve the central goal of freeing up traffic subject to effective competition (H.R. Rep. 96-1430, 96th Cong., 2d Sess. 89 (1980)):

In maintaining the term market dominance * * * the Conferees intend that whenever there is effective competition which will restrain rate increases by the railroads, such competition should continue to function as the regulator of the rate rather than the Commission. Maintenance of the "market dominance" standard is not intended in any way to restrict the ability of the Commission to apply this concept, both in its regulations and individual cases.

C35). The panel majority concluded that there might well be sound economic or administrative reasons for permitting the Commission to consider product and geographic competition (*id.* at C20), but reasoned that Congress's choice of the preposition "for" rather than "with," in the phrase "effective competition for * * * the transportation to which a rate applies," demonstrated a clear intent to preclude consideration of indirect competition (*id.* at C18-C21).

By a vote of eight to two, the court of appeals sitting en banc set aside the panel decision and affirmed the Commission's new market dominance standards (Pet. App. A1-A22). The court found (*id.* at A9) that the disputed 4R Act definition of market dominance does not contain "a detailed congressional formula for determining market dominance," but instead contains "a generally phrased test designed to achieve a stated goal—deregulation of rail rates subject to effective competition."⁹ To implement that policy Congress delegated to the Commission broad discretion in the 4R Act to set market dominance standards (Pet. App. A9, A11).¹⁰

⁹ The court declined to give dispositive weight to Congress's use of the preposition "for" as opposed to "with" in defining market dominance (Pet. App. A8, n.10). In addition, the court agreed with the ICC (Pet. App. A11) that nothing in the 4R Act evinces an intent to preclude consideration of indirect competition or requires the ICC "to make its decisions in a regulatory vacuum ignoring the practical effects of indirect competition."

¹⁰ The court of appeals also found (Pet. App. A12) that Congress, in the Staggers Act, reinforced the delegation of broad discretionary authority to the ICC to apply the market dominance concept.

The court of appeals deferred to the Commission's conclusion that consideration of indirect competition would further Congress's intention to limit rate regulation to situations where market forces will not protect shippers and the Commission's judgment that "consideration of such evidence is feasible within the requirements of the 4R Act" (Pet. App. A11). The court acknowledged that the ICC had departed from its prior position on both points (*id.* at A9), but held that the Commission was entitled to change its mind in light of experience and that the Commission had adequately explained its reasons for the change (*id.* at A10).

ARGUMENT

Petitioners' arguments have all been fully considered, first by a panel of the court of appeals, and then by the full en banc court of appeals. The latter rejected petitioners' contentions in a thoughtful and reasoned opinion, one that does not conflict with any holding of this Court or of another court of appeals. Further review is, therefore, not warranted.

1a. Petitioners argue (Pet. 13) that the literal meaning of the statutory definition of market dominance precludes consideration of geographic and product competition. They urge that the statute confines the inquiry to transportation alternatives that can compete for transportation of the same product between the same points, *i.e.*, "the transportation to which a rate applies."¹¹ In fact, the statute is not so limited.

¹¹ Petitioners have apparently abandoned the reasoning adopted by the original panel majority and the two dissenters from the decision of the court sitting en banc. The latter relied on Congress's choice of the preposition "for" instead of "with." See Pet. App. A14-A15, C18-C20. That analysis was

The ICC explained why the language relied upon by petitioners does not preclude geographic or product competition (Pet. App. D15-D16):

Since the "traffic to which the rate applies" faces competition from other sources or destinations of the same product or from substitute products, the carriers transporting that traffic face "indirect" competition from other carriers.
* * * "[E]ffective competition from other carriers or modes of transportation, for the traffic to which a rate applies" means that, if a carrier raises the rate for such traffic, then some or all of that traffic will be lost to other carriers or modes.

The language in Section 202(b) is thus not an obstacle to the ICC's decision to consider indirect competition. "Indeed, nothing in the 4R Act evinces congressional intent to preclude consideration of indirect competition" (Pet. App. A10-A11) and petitioners have pointed to nothing in the legislative history that specifically indicates Congress had direct competition in mind as the exclusive basis for the Commission's inquiry into market dominance.

Instead, petitioners refer (Pet. 12-13) to general statements in the legislative history regarding Congress's desire to avoid regulatory delay. From those

properly rejected by the eight-member majority as an insubstantial "prepositional controversy" leading to a result inconsistent with the overall purpose of the legislation (*id.* at A9 n.10). Although the dissent found the Commission's original interpretation persuasive based on its expertise (Pet. App. A14-A16), it is noteworthy that the Commission, in that original decision, apparently found no controlling significance in the choice of the preposition; it referred to direct competition "*with* the service outlined in the tariff" (Pet. App. H9 (emphasis added)).

statements, petitioners conclude that Congress restricted the definition of market dominance by referring only to competition from other carriers or modes carrying the same product between the same points. Petitioners point to nothing, however, that connects those legislative statements with the 4R Act definition of market dominance. There is evidence in the legislative history that Congress took seriously the concerns expressed by the ICC Commissioners that the "market dominance" provision might involve the ICC in complex antitrust litigation that could not be handled efficiently in ICC proceedings. Congress responded to those concerns, however, by delegating to the Commission the "authority to adopt rules of practical application which will identify markets in which dominance exists." S. Rep. 94-499, 94th Cong., 1st Sess. 47 (1975); see generally Pet. App. H16-H22.

b. Petitioners also argue (Pet. 15-16) that Congress in the Staggers Act of 1980 ratified or adopted the ICC's original 1976 interpretation of the statute.¹²

¹² In support of this theory, petitioners cite (Pet. 16 n.17) an article by former Congressman Eckhardt. This article is entitled to little, if any, weight as a plain attempt to create "subsequent legislative history" of the sort rejected by this Court in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132-133 (1974).

In a brief in support of the petition (at 5-9), a number of congressmen argue as amici curiae that the ICC had no authority to change its interpretation of the market dominance provision in *Ex parte* No. 320 (Sub-No. 2), because the original delegation of authority to the ICC to implement the market dominance provision (Section 202(b) of the 4R Act, 90 Stat. 35, formerly codified at 49 U.S.C. 1(5)(d)) expired after 240 days and was subsequently repealed by Pub. L. No. 95-473, § 4(b), 92 Stat. 1466-1470 (the "recodification"). This novel argument, never previously urged by any

The argument is based on Congress's failure to adopt a proposal which would have *required*, *inter alia*, consideration of geographic competition, in favor of retaining the original 4R Act definition. The proposal to which petitioners refer, H.R. 7235, 96th Cong., 2d Sess. § 202(c) (1980), would have replaced the generally phrased 4R Act definition of market dom-

party before the ICC or the court of appeals, is not properly before the Court. See *United States v. Tucker Truck Lines*, 344 U.S. 33 (1952). Moreover, like their argument regarding the history of the 4R Act this reconstruction of history should be disregarded. See *Regional Rail Reorganization Act Cases*, 419 U.S. at 132-133.

In any case, the theory is not corroborated by the legislative history of the 4R Act. Nothing indicates that Congress viewed the 240-day deadline as precluding later revision of the regulations originally adopted. Certainly, the D.C. Circuit envisioned further refinement of the standards when it upheld the original regulations (see note 4, *supra*).

Nor is there evidence that Congress sought to freeze the original regulations when it repealed Section 202(b) of the 4R Act in the 1978 recodification. To the contrary, in repealing Section 202(b) and numerous other provisions that had been executed, superseded, or otherwise rendered obsolete by the time of the 1978 recodification, Congress stated that the changes were meant to effect no substantive change in the Interstate Commerce Act. (§ 4(b), 92 Stat. 1466). Moreover, even if the Commission's authority to set standards was eliminated in 1978, the Commission still has broad rulemaking power under 49 U.S.C. (Supp. V) 10321(a). Cf. *American Trucking Ass'n v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967).

Finally, any doubt concerning the Commission's continuing power to construe the market dominance concept was removed in the Staggers Act. As the court of appeals pointed out, the Staggers Act reflects a "reinforced congressional intent to allow the ICC to continue to promulgate standards and procedures for making the market dominance determination" (Pet. App. A12), citing the final conference report (H.R. Rep. 96-1430, 96th Cong., 2d Sess. 89 (1980)).

inance with a detailed statutory definition that included a specific reference to geographic competition. That proposal would have removed much of the discretion originally conferred on the ICC to implement and administer the market dominance concept. See H.R. Rep. 96-1035, 96th Cong., 2d Sess. 4-5, 55-56 (1980). Failure to adopt a proposal that would have modified significantly the Commission's discretion to define market dominance does not support an inference that Congress intended to forbid the ICC from considering geographic and product competition.¹³

In fact, when the Staggers Act was passed and Congress decided to retain the existing market dominance provision of the 4R Act, the existing law was that indirect competition is a relevant criterion. As the court of appeals pointed out (Pet. App. A12), Congress was aware when the Staggers Act was debated that the ICC had been considering geographic and product competition in its market dominance determinations.¹⁴

¹³ Petitioners also cite (Pet. 14 n.15) Section 205 of the Staggers Act (94 Stat. 1905) in support of their reading of the statute. In that Section, Congress directed the ICC to study the feasibility of considering product competition in the context of determining reasonableness of rates, as opposed to market dominance. Congress was, however, conscious that Section 205 might be misinterpreted in the dispute over whether to consider product and geographic competition in the market dominance inquiry, and therefore it expressly stated that the enactment of Section 205 should not be considered "in any proceeding * * * to determine the proper scope of the term 'market dominance'." § 205(a)(3)(B), 94 Stat. 1906.

¹⁴ As petitioners point out (Pet. 6), an oversight committee of Congress criticized the Commission's decision in *Incentive Rates on Coal—Axial, Co. to Coleto Creek, TX*, 362 I.C.C. 572 (1980), in which it relied upon indirect competition in mak-

2a. Petitioners argue (Pet. 16-20) that the court of appeals abdicated its judicial review responsibilities by failing to conduct an independent statutory analysis and, instead deferring to the ICC's later (rather than its original) interpretation. Neither of these contentions has merit.

Petitioners' basic quarrel with the court of appeals is that the court did not agree with petitioners' view of the plain meaning of the statute. The court of appeals held (Pet. App. A9):

The 4R Act does not contain a detailed congressional formula for determining market dominance. Instead, it contains a generally phrased test designed to achieve a stated goal—deregulation of rail rates subject to effective competition.

Although the court of appeals properly approached the problem "with a recognition of [its] limited role * * * in reviewing an administrative agency's construction of its statutory authority and the regulations promulgated pursuant thereto" (Pet. App. A7), it did not abdicate its responsibility. It considered petitioners' "plain meaning" contention (Pet. App. A8 n.10), but agreed with the ICC's interpretation, which is that the statute does not require, but does permit consideration of geographic and product competition.

Petitioners' argument assumes improperly that there can be only one "correct" interpretation of this

ing its market dominance determination under the 4R Act. Petitioners emphasize the criticism, which is irrelevant: what is relevant is that in the debates leading to enactment of the Staggers Act, the members on the oversight committee were obviously aware that the ICC then considered geographic and product competition evidence admissible under the original 4R Act, but nevertheless Congress reenacted that provision.

statute. But in fact Section 202(b) is open-ended and indeterminate, and the court of appeals was quite correct in concluding that the Commission's reading is permissible and should therefore be upheld. See, e.g., *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981); *Batterton v. Francis*, 432 U.S. 416 (1977). Deference is particularly appropriate where, as here, Congress delegated to the agency the task of providing specific content to a broad statutory directive. See *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593-599 (1981); *NLRB v. Hearst Publications*, 322 U.S. 111, 126-127 (1944).

b. In urging that the court of appeals erred in failing to give adequate weight to the ICC's original 1976 decision, petitioners invoke (Pet. 17-20) the well-established principle that the contemporaneous interpretation of a statute by agency officials who participated in legislative deliberations is to be given great weight by a reviewing court. Although that consideration properly played a role in the D.C. Circuit's review of the ICC's 1976 decision (see page 3, *supra*), it is of much more limited importance here. Under petitioner's theory, once an agency has interpreted a statute, that interpretation is frozen for all time, unless Congress enacts new legislation. But administrative law is not so inflexible. As this Court recognized in *American Trucking Ass'n v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967), "the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice." The agency's authority to modify its prior interpretations is, of course, limited by its obligation to provide a

reasoned explanation for the change. The ICC, in 1981, presented an adequate explanation for its change of position on the indirect competition issue.¹⁵

3. Petitioners assert (Pet. 8-11) that the effect of the Commission's new interpretation will be to reduce the number of rate filings the agency will review for reasonableness and therefore shippers will not be adequately protected from abuses by carriers. This argument is, however, addressed to the wrong branch of government. It was Congress that decided that shippers should derive their primary protection from the market and not from the ICC. The decisions of the Commission and the court are faithful to that decision. Since the court below correctly applied settled principles of judicial review to the Commission's action, further review by this Court is unwarranted.

¹⁵ Petitioners argue (Pet. 18-19) that the ICC offered no new evidence or analysis to support its change of position on the question of the feasibility of considering geographic and product competition. In its decision, the ICC relied principally upon the adoption of the new guidelines to overcome the problem (Pet. App. D18) :

We no longer believe that it is appropriate to assume, prior to any investigation, that this problem would exist in every case. With appropriate guidelines for submitting evidence, determining the presence of effective geographic or product competition should be manageable in most cases.

The Commission's decision was thus "primarily of a judgmental or predictive nature" and complete record support was not required. *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 813 (1978). In addition, as noted above, the ICC had in fact been considering such evidence for years in rate cases and it was not incumbent upon the ICC to present evidence of that fact in order to invoke its experience.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

JOHN BROADLEY
General Counsel

HENRI F. RUSH
Associate General Counsel

TIMM L. ABENDROTH
Attorney
Interstate Commerce Commission

MARCH 1984

MAR 29 1984

STEVAS.

CLERK

No. 83-1341

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WESTERN COAL TRAFFIC LEAGUE, *et al.*,*Petitioners.*

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *et al.*,*Respondents.*

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

**BRIEF OF RESPONDENT
RAILROADS IN OPPOSITION**

ROBERT BATCHELDER
Union Pacific Railroad
1416 Dodge Street
Omaha, Nebraska 68179

MICHAEL BOUDIN*
J. PETER BYRNE
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044

JOHN A. DAILY
Conrail
1138 Six Penn Center Plaza
Philadelphia, PA 19104

JOSEPH D. FEENEY
Western Railroad Association
222 S. Riverside Plaza
Chicago, Illinois 60606

SAMUEL R. FREEMAN
Denver and Rio Grande
Western Railroad Co.
Park Central Plaza
Denver, Colorado 80217

HANFORD O'HARA
Bessemer and Lake Erie
Railroad Co.
135 Jamison Lane
P.O. Box 68
Monroeville, PA 15146

March 1984

**Counsel of Record*

[List of Counsel Continued on Inside Cover]

- STUART F. GASSNER**
Chicago and North Western
Transportation Co.
400 West Madison Street
Chicago, Illinois 60606
- JAMES L. HOWE, III**
Norfolk Southern Corp.
204 South Jefferson Street
Roanoke, VA 24042
- RICHARD W. KIENLE**
Norfolk & Western
Railway Co.
8 North Jefferson Street
Roanoke, VA 24042
- HOWARD KOONTZ**
Illinois Central Gulf
Railroad Co.
233 North Michigan Avenue
Chicago, Illinois 60601
- THORMUND A. MILLER**
CAROL HARRIS
Southern Pacific
Transportation Co.
One Market Plaza
San Francisco, CA 94105
- MILTON E. NELSON, JR.**
The Atchison, Topeka and
Santa Fe Railway Co.
80 East Jackson Boulevard
Chicago, Illinois 60604
- C. HAROLD PETERSON**
Soo Line Railway Co.
Box 530
Minneapolis, MN 55440
- DONAL L. TURKEL**
Burlington Northern
Railway Co.
176 East Fifth Street
St. Paul, MN 55101
- CHARLES C. RETTBERG, JR.**
Chessie System
3000 Terminal Tower
Cleveland, Ohio 44101
- ALBERT B. RUSS, JR.**
Seaboard System
500 Water Street
Jacksonville, Florida 32202
- JAMES E. SYKES**
Missouri Pacific Railroad Co.
Missouri Pacific Building
210 North 13th Street
St. Louis, Missouri 63101
- J. THOMAS TIDD**
Association of American
Railroads
1920 L Street, N.W.
Washington, D.C. 20036

Attorneys for the Respondent Railroads

QUESTION PRESENTED

Whether the Interstate Commerce Commission is permitted to consider all relevant evidence of "effective competition" including product and geographic competition in determining whether "market dominance" exists in individual railroad rate proceedings.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	7
I. This Case Does Not Merit Review Under Accepted Standards for Certiorari	7
II. The Commission Has Statutory Authority to Con- sider Product and Geographic Competition in Mar- ket Dominance Cases	10
CONCLUSION	16

TABLE OF AUTHORITIES

CASES:	Page
<i>A. L. Mechling Barge Lines, Inc. v. United States</i> , 368 U.S. 324 (1961)	12
<i>American Trucking Ass'ns v. Atchison T. & S.F. Ry.</i> , 387 U.S. 397 (1967)	14
<i>Atchison, T. & S.F. Ry. v. ICC</i> , 580 F.2d 623 (D.C. Cir. 1978)	4, 8
<i>Batterton v. Francis</i> , 432 U.S. 416 (1977)	14
<i>Central Power & Light Co. v. United States</i> , 634 F.2d 137 (5th Cir. 1980), <i>on rehearing</i> , 639 F.2d 1104 (5th Cir.), <i>cert. denied</i> , 454 U.S. 831 (1981)	8, 10
<i>Chicago & E. I. R.R. v. United States</i> , 384 F. Supp. 298 (N.D. Ill. 1974), <i>aff'd per curiam</i> , 421 U.S. 956 (1975)	9
<i>Farmland Industries, Inc. v. United States</i> , 642 F.2d 208 (7th Cir. 1981)	14
<i>Iowa Public Service Co. v. ICC</i> , 643 F.2d 542 (8th Cir. 1981)	8, 9
<i>New England Power Co. v. United States</i> , 693 F.2d 239 (1st Cir. 1982)	6, 8
<i>Pennian Basin Area Rate Cases</i> , 390 U.S. 747 (1968)	12
<i>Regional Rail Reorganization Act Cases</i> , 419 U.S. 102 (1974)	13
<i>Tampa Electric Co. v. Nashville Coal Co.</i> , 365 U.S. 320 (1961)	9
<i>Udall v. Tallman</i> , 380 U.S. 1 (1965)	14
<i>United States v. E.I. du Pont de Nemours & Co.</i> , 351 U.S. 377 (1956)	9
<i>United States v. ICC</i> , 352 U.S. 158 (1956)	12
<i>Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.</i> , 435 U.S. 519 (1978)	10
<i>Watt v. Alaska</i> , 451 U.S. 259 (1981)	7
 INTERSTATE COMMERCE COMMISSION PROCEEDINGS:	
<i>CSX Corp.</i> , 363 I.C.C. 518 (1980)	9, 12
<i>Consumers Power Co. v. N. & W. Ry.</i> , No. 37854s (<i>served March 22, 1983</i>)	9
<i>Ex Parte 270 (Sub. No. 4)</i> , 345 I.C.C. 71 (1974)	9

Table of Authorities Continued

	Page
<i>Ex Parte No. 319</i> , 361 I.C.C. 238 (1979), <i>aff'd in relevant part and remanded sub nom.</i> , <i>National Ass'n of Recycling Industries, Inc. v. ICC</i> , 627 F.2d 1328 (D.C. Cir. 1980), <i>modified per curiam</i> , 445 U.S. 609 (1981)	9
<i>Ex Parte 320</i> , 353 I.C.C. 874 (tentative rules), <i>modified</i> , 355 I.C.C. 12 (1976) (final rules), <i>on remand</i> , 359 I.C.C. 735 (1979)	3, 5
<i>Illinois G.C. R.R.—Acquisition</i> , 338 I.C.C. 805 (1971)	2
<i>Potomac Electric Power Co. v. B. & O. R.R.</i> , No. 37872S (served December 27, 1982)	9
 STATUTES AND REGULATIONS:	
Interstate Commerce Act, 24 Stat. 379 (1887)	2
49 U.S.C. § 10101. <i>et seq.</i>	2, 5
49 U.S.C. § 10701a(b)(1)	3
49 U.S.C. § 10709(a)-(c)	3
49 U.S.C. § 10709(d)	5
Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31	2
Staggers Rail Act of 1980, 94 Stat. 1895	5, 13, 14
92 Stat. 1337	5
 LEGISLATIVE HISTORY:	
126 Cong. Rec. H. 6011 (daily ed. July 2, 1980)	14
H. Rep. No. 94-781, 94th Cong., 2d Sess. (1976)	11
H. Rep. No. 96-1035, 96th Cong., 2d Sess. (1980) ..	2, 3, 5
H. Rep. No. 96-1430, 96th Cong., 2d Sess. (1980)	5, 14
House Commerce Subcommittee on Oversight, <i>Report on Railroad Coal Rates</i> , 96th Cong. 2d Sess. 88 (1980)	13

Table of Authorities Continued

	Page
MISCELLANEOUS:	
P. Areeda & D. Turner, <i>Antitrust Law</i> (1978)	11
Kearny, <i>A Study to Perform an In-Depth Analysis of Market Dominance and Its Relationship to Other Provisions of the 4-R Act</i> (1979)	5
Landes & Posner, "Market Power in Antitrust Cases," 94 <i>Harv. L. Rev.</i> 937 (1981)	11
F. Scherer, <i>Industrial Market Structure and Economic Performance</i> (2d ed. 1980)	11

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1341

WESTERN COAL TRAFFIC LEAGUE, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

**BRIEF OF RESPONDENT
RAILROADS IN OPPOSITION**

The respondent railroads, listed at pp. 1a-2a, below, submit this brief in opposition to the petition for certiorari.

STATEMENT OF THE CASE

Petitioners—representing primarily utilities and other coal shippers—seek review of guidelines issued in 1981 by the Interstate Commerce Commission¹ and applied since that time in determining the factual question whether “market dominance” exists in individual railroad rate cases arising under the

¹ *Ex Parte 320* (Sub. No. 2), 365 I.C.C. 118 (1981). Pet. App. D. References to “Pet. App.” are to the separate appendix volume accompanying the certiorari petition.

Interstate Commerce Act. The Court of Appeals for the Fifth Circuit, sitting *en banc*, upheld the guidelines as a reasonable exercise of the Commission's broad authority, expressly conferred by statute, to implement the market dominance concept.² The agency's guidelines employ accepted tests of competition and accord with the governing statute. No conflict exists among the circuits or with any decision of this Court.

1. For almost a hundred years, between enactment of the Interstate Commerce Act in 1887 and the amending 4-R Act in 1976,³ virtually all interstate railroad rates were subject to ICC scrutiny to assure that they were reasonable and non-discriminatory. Any attempt by a railroad to raise or lower a rate could, and often did, prompt lengthy and expensive administrative proceedings. Railroads were thus subject to pricing constraints unknown in most segments of American industry.

By 1976, the premise for such extensive railroad rate regulation—railroad dominance of transportation—had long been outdated. Since World War II more than two-thirds of intercity freight tonnage had been captured by trucks, barges, pipelines, airlines and other forms of transportation. H. Rep. No. 96-1035, 96th Cong., 2d Sess. 35 (1980). The result is that today, "there are few significant commodities which are not practically susceptible to transportation by at least two competing modes of surface transportation." *Illinois G.C. R.R. - Acquisition*, 338 I.C.C. 805, 836 (1971).

The railroads' steady loss of business after World War II matched their increasingly serious financial plight. Rates of return on capital fell to a fraction of the cost of new capital, preventing needed modernization of aging systems. Major railroads in the East followed each other into bankruptcy. In

² *Western Coal Traffic League v. United States*, 719 F.2d 772 (1983). Pet App. A.

³ Interstate Commerce Act, 24 Stat. 379 (1887), amended *inter alia* by the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), 90 Stat. 31, now codified in 49 U.S.C. § 10101, *et seq.*

enacting the 4-R Act in 1976, Congress found that cumbersome and excessive agency regulation of rates was a major cause of the railroads' financial condition and of their loss of traffic to other modes of transportation. H. Rep. No. 96-1035, *supra*, at 35.⁴

Congress enacted the 4-R Act to restore health to the rail industry by reducing ICC regulation and providing railroads with "greater freedom to raise or lower rates for rail services in competitive markets." 90 Stat. 33. Among other changes, the new law *abolished* maximum rate regulation wherever the railroad charging the rate lacked "market dominance."⁵ The statute defined market dominance broadly as "an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which the rate applies." *Id.* Congress delegated to the Commission the authority to adopt, after considering the views of the Justice Department and the Federal Trade Commission, "standards and procedures" for determining whether a railroad possesses market dominance in particular cases. *Id.*

The Commission proceeded cautiously. In its initial rules, it adopted three evidentiary presumptions providing that when certain trigger facts were proved, the Commission would rebuttably presume the existence of market dominance, leaving the railroads free to refute the showing with other evidence of effective competition.⁶ Contrary to the views of the Justice Department and the FTC, the ICC also said that it would not consider evidence of geographic or product competition in deciding whether rail service is subject to effective competition.

⁴ Congress found that these competing modes of transportation are both more prosperous and less regulated. See H. Rep. No. 96-1035, *supra*, at 35-36.

⁵ 90 Stat. 35, now codified at 49 U.S.C. §§ 10701(a)(1), 10709(a)-(c).

⁶ *Ex Parte No. 320*, 353 I.C.C. 874 (tentative rules), modified, 355 I.C.C. 12 (1976) (final rules).

Since geographic and product competition are the central issue in this case, a brief description of each concept is useful:

Geographic competition exists where the ability of a shipper to obtain a product from an alternative source or send a product to a different destination restrains the railroad rate in question.⁷

Product competition exists where the ability of a shipper to use a substitutable product restrains the railroad rate in question.⁸

Both forms of competition have long been recognized as effective constraints on pricing, both in the railroad industry and elsewhere, in judicial decisions, agency regulation, and economic literature. See pp. 9-11, below.

On judicial review, the District of Columbia Circuit upheld the Commission's initial rules.⁹ Stressing the ICC's duty to reexamine its rules later in the light of actual experience, the court affirmed the Commission's decision not to consider product and geographic competition. The court made clear that it was upholding the decision as an exercise of agency discretion and that the statute did not compel the Commission to ignore these forms of competition. *Id.* at 633-34.

⁷ As Judge Brown explained below: "[T]he idea of geographic competition makes economic sense For example, a Chicago coal purchaser might have two alternate sources of supply: Southern Illinois and Wyoming coal being a fungible commodity[.] the Chicago purchaser has no preference between the two The carrier, if it hopes to secure the Wyoming business, must and will take the alternative source into account — a pure case of geographic competition within a market." *Western Coal Traffic League v. United States*, 694 F.2d 378, 398 (1982) (Pet. App. C-35) (dissent to original panel opinion).

⁸ For example, if a power plant can readily burn either coal or oil, the railroad rate for carrying coal from the mine to the power plant may be constrained by effective competition from another rail carrier (or a pipeline or barge) transporting oil to the same plant.

⁹ *Atchison, T. & S.F. Ry. v. ICC*, 580 F.2d 623 (1978). The court remanded on an aspect of the initial rules not here involved.

Shortly thereafter, the Commission in 1979 ruled in *Ex Parte No. 320* that it would consider evidence of product and geographic competition to rebut presumptions of market dominance. 359 I.C.C. at 736 n.7. Accordingly, the Commission has now been considering product and geographic competition in market dominance cases for approximately five years.

2. Dissatisfied with the extent of deregulation under the 4-R Act, Congress in 1980 enacted the Staggers Rail Act.¹⁰ The Staggers Act, *inter alia*, required the Commission to deregulate any rail rate that is below a specified percentage of the variable cost of providing the service. 94 Stat. 1900, codified at 49 U.S.C. § 10709(d). In all other respects, Congress maintained unchanged the statutory market dominance standard, stressing that it did not intend "in any way to restrict the ability of the Commission to apply [the market dominance] concept, both in its regulations and individual cases."¹¹ Significantly, Congress knew that the ICC at that time was considering product and geographic competition in market dominance decisions and had announced its intention to continue doing so.¹²

Following enactment of the Staggers Act, the ICC instituted *Ex Parte No. 320* (*Sub No. 2*). After receiving comments from interested parties, the Commission repealed its

¹⁰ Staggers Rail Act of 1980, 94 Stat. 1895, codified in various sections of 49 U.S.C. § 10101, *et seq.* Congress found that the ICC's initial market dominance rules "freed up less than 30 percent of the traffic from regulation" (H. Rep. No. 96-1035, *supra*, at 38), even though a study performed for the ICC confirmed that less than 5 percent of all rail traffic is market dominant in the long run and only 10-15 percent in the short run. Kearny, *A Study to Perform an In-Depth Analysis of Market Dominance and Its Relationship to Other Provisions of the 4-R Act*, IX (1979).

¹¹ H. Rep. No. 96-1430, 96th Cong., 2d Sess. 89 (1980). In 1978, in the interim between the 4-R Act and the Staggers Act, Congress recodified the entire Interstate Commerce Act. In doing so, it condensed the phrase "traffic or movement" in the market dominance provision into "transportation." 92 Stat. 1382. Congress explicitly said that no changes in meaning were intended. *Id.* at 1466.

original presumptions and adopted detailed guidelines describing evidentiary factors and procedural steps for making market dominance decisions. Pet. App. D. In the guidelines, it reaffirmed that it would continue to consider evidence of product and geographic competition. This last decision was supported by a wealth of evidence, including evidence of actual railroad industry practice,¹³ the official views of the Department of Transportation,¹⁴ and the Commission's own expert judgment that this course would foster more accurate market dominance decisions. Pet. App. at D-14.

Petitioners sought judicial review of the new guidelines on various grounds in the Court of Appeals for the Fifth Circuit.¹⁵ The court denied a stay, so the ICC has applied its new guidelines since 1981 and has continued to consider product and geographic competition, as it had done since 1979. Other utilities also sued in the First Circuit to prevent the ICC from applying the new guidelines to pending cases. This attempt was rejected by the First Circuit, which noted "the substantial public interest . . . in deregulation of those rail carriers who are in fact subject to effective competition." *New England Power Co. v. United States*, 693 F.2d 239, 245 (1982).

In the Fifth Circuit, the panel that initially reviewed the guidelines sustained them in most respects. Pet. App. C. However, by a 2-to-1 vote, the panel held that the statute did not

¹³ Railroad officers, who are responsible for making pricing decisions, confirmed with specific examples that railroads must and do take product and geographic competition into account in setting rates. See Verified Statements of R. N. Van Hook, John B. McMichael, and Timothy James Hurley submitted in *Ex Parte No. 320 (Sub No. 2)*.

¹⁴ DOT comments in *Ex Parte No. 320 (Sub No. 2)*. The Department of Justice and the FTC had earlier expressed the same position. See p.3, above.

¹⁵ The new guidelines (Pet. App. at D-19 - D-24), together with the explanatory decision (*id.* at D-1 - D-19) reflect a detailed code of substantive and procedural rules for market dominance determinations, and petitioners in the Court of Appeals initially attacked a number of different elements in the guidelines. In this Court, petitioners appear to have abandoned all of their attacks except the claim that the Commission was not permitted to continue to consider product and geographic competition.

permit the Commission to consider evidence of product and geographic competition. *Id.* at C-18 - C-21. On rehearing *en banc*, the full court held 8 to 2¹⁶ that the statute did not prevent evidence of product and geographic competition. Pet. App. A. The *en banc* decision noted that prohibiting the Commission from considering product and geographic competition “[u]ndoubtedly” would continue regulation of some competitive rates, a result that “flies in the face of Congress’ stated policy of deregulation of rates subject to effective market control.” *Id.* at A-11. The effect of the *en banc* decision was to sustain in all respects the Commission’s guidelines.

REASONS FOR DENYING THE WRIT

In the 4-R Act, Congress defined market dominance in general terms, and it delegated to the ICC the responsibility to delineate and apply the concept. In this case, the ICC permissibly exercised its expert discretion in adopting the challenged guidelines. The Commission had ample basis for considering evidence of product and geographic competition, which are competitive forces widely recognized in law and business as capable of effectively restraining prices including railroad rates. There is no conflict among the circuits or with any decision of this Court and no other reason for further review in this case.

I. This Case Does Not Merit Review Under Accepted Standards for Certiorari.

This case meets none of the established criteria for certiorari. The Commission’s decision to continue considering evidence of product and geographic competition, upheld by the *en banc* court below, involves only a “unique question of statutory construction” without precedential significance for other statutes. *Watt v. Alaska*, 451 U.S. 259, 274 (1981) (Stevens, J., concurring). No conflict exists among the circuits, and the

¹⁶ The only two dissenters from the *en banc* decision were the two members of the original panel majority.

Commission's approach accords with decisions of this and other courts, practice in the railroad industry, and the views of economists and legal scholars.

Every court of appeals decision that touches upon whether the Commission can admit evidence of product and geographic competition has suggested at least implicitly that such forces may be considered. Most relevant is *Atchison, T. & S.F. Ry. v. ICC*, *supra*, where the D.C. Circuit reluctantly sustained the Commission's initial refusal to consider product and geographic competition. The court there insisted that its judgment represented only a deferral to the discretion of the agency. It deprecated the argument, advanced here by petitioners, that Congress prohibited the Commission from considering product and geographic competition, suggesting that such a reading might seem "to attribute excessive significance to a terse statutory clause." 580 F.2d at 634. The court also stressed that the ICC's decision was "part of an ongoing process of agency scrutiny, correction and refinement." *Id.* at 630.¹⁷

The Commission's decision to consider product and geographic competition accords, more broadly, with numerous decisions of the courts recognizing that product and geographic

¹⁷ Other cases merit briefer mention. In *Iowa Public Service Co. v. ICC*, 643 F.2d 542 (1981), the Eighth Circuit upheld an ICC decision that no product or geographic competition had been proved on the facts of the particular case; the court expressed no doubt that such evidence could be considered.

In *New England Power Co. v. United States*, *supra*, the First Circuit upheld the ICC in applying the new guidelines to pending cases. While the court did not pass on the merits of the guidelines, it emphasized Congress' repeated grants of authority on the issue to the Commission and quoted this Court pertinently: "The construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong" 693 F.2d at 244.

Before the Commission issued its current guidelines, the Fifth Circuit remanded a market dominance decision to the ICC to explain why it was considering product and geographic competition. *Central Power & Light Co. v. United States*, 634 F.2d 127 (5th Cir. 1980), *on rehearing*, 639 F.2d 1104, *cert. denied*, 454 U.S. 831 (1981). If the court had thought that the statute prohibited such consideration, no remand would have been required.

competition do constrain prices. This Court has held, for example, that the price of cellophane is constrained by the availability of substitutable wrapping paper (*United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956))—an example of product competition—and that different Appalachian coal mines at different origins compete with one another in serving a Florida power plant (*Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961))—a classic instance of geographic competition. The ICC itself has considered evidence of product and geographic competition for many years in resolving other issues of competition.¹⁸

Petitioners' suggestion that under the guidelines the Commission no longer will have jurisdiction over rates for non-competitive traffic is completely unfounded. The Commission has merely agreed to consider evidence of product and geographic competition on a case-by-case basis and give that evidence whatever weight it may be worth in demonstrating that effective competition exists. What petitioners seek is a rigid exclusionary rule that compels the Commission to ignore product and geographic competition evidence in every case, no matter how persuasive it may be.

In prior market dominance cases, the Commission has sometimes found that product and geographic competition effectively constrained the challenged rates, but sometimes it has rejected the allegations and found the rates subject to regulation.¹⁹ Thus, actual experience since 1979 hardly substantiates shipper claims that invocation of product and geo-

¹⁸ See, e.g., *Chicago & E.I.R.R. v. United States*, 384 F. Supp. 298, 300-01 (N.D. Ill. 1974), aff'd per curiam, 421 U.S. 956 (1975); *Ex Parte No. 319*, 361 I.C.C. 238, 242-43, aff'd in relevant part and remanded sub nom. *National Ass'n of Recycling Industries, Inc. v. ICC*, 627 F.2d 1328 (D.C. Cir. 1980), modified per curiam, 449 U.S. 609 (1981); *CSX Corp.*, 363 I.C.C. 518, 571 (1980). Indeed, in some cases, product and geographic competition have been found to be the *most* important competitive influence on railroad rates. *Ex Parte 270* (Sub No. 4), 345 I.C.C. 71, 135, 313 (1974).

¹⁹ See, e.g., *Iowa Public Service Co. v. ICC*, *supra*; *Potomac Elec. Power Co. v. B. & O. R.R.*, No. 37872s (served December 27, 1982); *Consumers Power Co. v. N. & W. Ry. Co.*, No. 37854s (served March 22, 1983).

graphic competition has been an "open-sesame" to wholesale deregulation. Moreover, judicial review remains available in each individual case to assure that the Commission does not exceed Congress' directive to free competitive rates from regulation.²⁰

Petitioners claim that it is so difficult to evaluate product and geographic competition that introduction of such evidence will cause administrative delay and confusion. The Commission, however, has been considering product and geographic competition in market dominance cases since 1979 (and in other cases since the Nineteenth Century (p. 9 & n.18, above)) without encountering unusual practical difficulties. In any event, an agency's judgment about its own internal operations is entitled to exceptional deference from courts. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-25 (1978). The ICC found that its guidelines will foster expeditious market dominance decisions and actually reduce the litigation burden on shippers by their greater detail and more precise allocations of burdens of proof. Pet. App. at E-4 - E-5.

II. The Commission Has Statutory Authority to Consider Product and Geographic Competition in Market Dominance Cases.

The petition for certiorari not only fails to establish any of the usual grounds for review in this Court but the decision it seeks to have reviewed is plainly correct. The language, legislative history and purpose of the market dominance statute all demonstrate that there is nothing in the statute that precludes the Commission from considering product and geographic competition in determining whether there is effective competition for the traffic involved.

²⁰ Any final decision by the Commission that it will not apply the reasonableness standard to rates for particular traffic because effective competition exists is subject to judicial review, whether the finding of effective competition is based on product and geographic competition or on any other form of competition. See, e.g., *Central Power & Light Co. v. United States, supra*.

Congress defined market dominance broadly in terms of "effective competition" and did not distinguish among types of competition that could be considered. It also delegated to the Commission the authority to promulgate standards for determining market dominance. As the Court below stated,

"The 4R Act does not contain a detailed congressional formula for determining market dominance. Instead, it contains a generally phrased test designed to achieve a stated goal—deregulation of rail rates subject to effective competition." Pet. App. at A-9.

The legislative history also confirms that Congress intended the Commission to look to *economic reality* in determining the existence of competitive forces effective to restrain rates. The final 4-R Act Conference Report states, "it is intended that when the Commission administers the test, *it will recognize the absence of forces which normally govern competitive markets.*" H. Rep. No. 94-781, 94th Cong., 2nd Sess. 148 (1976) (emphasis added). As already noted, the Department of Justice, and other Government agencies expert in evaluating competitive conditions, have long supported the Commission's view that product and geographic competition do constrain rates in the real world and that evidence of such constraints should be considered in market dominance cases. Expert anti-trust scholars and commentators agree that such forces can and do constrain prices.²¹

Common sense, brought to bear through a single example, supports the same conclusion. Consider a single power plant, sited on a river and served by a single rail line carrying coal from one mine; and assume that it is served also by a single barge line carrying coal from a second coal mine at a different origin. If the railroad raises its rates unduly or the quality of the service is poor, the plant may well be able to use the barge line to provide it with coal, creating effective competition

²¹ See, e.g., 2 P. Areeda & D. Turner, *Antitrust Law*, §§ 502, 504, 523-28 (1978); F. Scherer, *Industrial Market Structure and Economic Performance* 60-61 (2d ed. 1980); Landes & Posner, "Market Power in Antitrust Cases," 94 *Harv. L. Rev.* 937, 960-72 (1981).

constraining the railroad rate. There is no reason why such evidence of barge competition should be excluded automatically in market dominance cases.²²

Petitioners' claim that the Commission and the *en banc* Court erred rests only on a labored construction of the bare language of the statute. Petitioners concede that nothing in the statute specifically forbids considering product and geographic competition, but they argue that in those instances the railroad and the competing carrier do not compete "for the movement" to which the challenged rated applies, because a "movement" usually refers to the carriage of a product between two fixed points. They conclude that the carrier offering product or geographic competition may compete "with" the movement at issue but cannot compete "for" it.²³

But a court "cannot infer so much from so little." *Permian Basin Area Rate Cases*, 390 U.S. 747, 774 (1968). The statutory language speaks of effective competition "for the traffic or movement." "Traffic," a well-established railroad concept, embraces an array of movements from several origins or to several destinations (*e.g.*, the ICC has spoken of "source [geographic] competition for coal traffic" in the Southeast, *CSX Corp., supra*, 363 I.C.C. at 571) and embraces transportation of many substitutable commodities (*e.g.*, traffic in fresh fruits and vegetables from Florida).²⁴ A carrier who offers product

²² Whether the barge line *does* provide effective competition for the railroads, in the particular circumstances, is a factual question the agency might have to resolve, just as it would have to resolve the question whether two railroads running side by side were effective competitors for particular traffic. Petitioners' position, however, is that the agency may not even consider the evidence under the market dominance statute.

²³ Petitioners also argue that the statutory phrase "from other carriers" excludes product and geographic competition. This construction is without merit. Product and geographic competition in this context are offered by *other carriers* moving substitutable goods or the same goods from different origins or to different destinations.

²⁴ See, *e.g.*, *A. L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 326 (1961) (competition between barges for grain "traffic from the producing areas into Chicago"); *United States v. ICC*, 352 U.S. 158, 160 (1956) ("military export traffic").

and geographic competition competes "for" the same traffic to which a rate applies, because if the rate is too high the competing carrier will take away the transportation business.

Petitioners also say that Congress in the Staggers Act did not change materially the statutory definition of market dominance, arguing that Congress thereby "reenacted" and approved the Commission's pre-existing decision as to whether it would consider product and geographic competition. This argument undermines the petitioners' position rather than assists them. At the time Congress enacted the Staggers Act in 1980, the ICC had already in 1979 expressly stated that it *would* consider product and geographic competition in determining market dominance and had in fact decided cases based upon the presence or absence of these forces. See p. 5, above. Since Congress knew of the ICC's position, any "reenactment" of the market dominance test without change validates the Commission's current position.²⁵

It has also been argued that product and geographic competition are implicitly barred because Congress in passing the Staggers Act considered—but did not pass—a provision that would have required the Commission to consider geographic competition under a specific and compulsory statutory definition.²⁶ The opponents of that proposed definition said that they did not object as such to the consideration of geographic competition but merely to the formulation in the proposed

²⁵ Congress not only knew of the ICC's ongoing consideration of these forces but criticized the ICC for acting *ad hoc* instead of by rulemaking. In this case, the ICC has acted by rulemaking. See House Commerce Subcommittee on Oversight, *Report on Railroad Coal Rates*, 96th Cong., 2d Sess. 88 (1980).

²⁶ This argument is made in an amici brief (p.15) filed on behalf of several Congressmen. *Post hoc* claims by individual Congressmen are not appropriate evidence of congressional intent. E.g., *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974). Amici's counsel has been associated with one of the law firms currently representing petitioners in this case.

statute.²⁷ There is thus no plausible inference that Congress meant to bar the Commission from developing its own definitions of product and geographic competition.²⁸ In any event, Congress itself specifically negated any such inference in its final Conference Report on the Staggers Act:

"Maintenance of the 'market dominance' standard is not intended in any way to restrict the ability of the Commission to apply this concept, both in its regulations and individual cases." H. Rep. No. 96-1430, *supra*, at 89.

Courts generally defer, of course, to the interpretation of a statute by the expert agency charged with its administration. *Udall v. Tallman*, 380 U.S. 1 (1965). The deference required is even greater where, as here, the ICC is actually exercising a delegated power to prescribe "standards and procedures" in order to elaborate and implement a broadly phrased statutory directive.²⁹ In such circumstances, "Congress entrusts to the [agency], rather than to the courts, the primary responsibility for interpreting the statutory term." *Batterton v. Francis*, 432 U.S. 416, 425 (1977). Whatever rubric one employs to measure the Commission's action—literal language, legislative history,

²⁷ Then Congressman Eckhardt, the principal opponent of the proposed statutory definition, said at that time that he considered it "perfectly proper" to "deprive the ICC of jurisdiction" where there existed a "true alternative source"; but he objected that the proposed definition was not properly drafted to achieve this result. 126 Cong. Rec. H6011 (daily ed. July 2, 1980).

²⁸ See, e.g., *Farmland Industries, Inc. v. United States*, 642 F.2d 208, 211-13 (7th Cir. 1981) (Congress' rejection of a bill requiring the ICC to consider a factor did not bar ICC from considering the factor in applying its own flexible rule).

²⁹ Petitioners argue that the ICC's decision is entitled to no deference, because the agency once held a different view; but agencies are expected to modify their rules and policies in response to experience and reflection. *American Trucking Ass'n v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967). As for the amici's claim (pp.5-9) that the ICC lost its authority to change market dominance rules, this is squarely refuted by the legislative history quoted in text on this page.

statutory purpose, or deference to expertise and precedent—the Commission had ample basis for its decision in this case.³⁰

³⁰ Petitioners (p.14) and amici (p.17) also argue that Section 205 of the Staggers Act, 94 Stat. 1905, impliedly prohibits the ICC from considering product and geographic competition in determining market dominance. Not only is the inference wrong, but Section 205 itself explicitly forbids such an inference in subsection (a)(3)(B).

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

ROBERT BATCHELDER
 Union Pacific Railroad
 1416 Dodge Street
 Omaha, Nebraska 68179

MICHAEL BOUDIN*
J. PETER BYRNE
 1201 Pennsylvania Ave., N.W.
 P.O. Box 7566
 Washington, D.C. 20044

JOHN A. DAILY
 Conrail
 1138 Six Penn Center Plaza
 Philadelphia, PA 19104

JOSEPH D. FEENEY
 Western Railroad Association
 222 S. Riverside Plaza
 Chicago, Illinois 60606

SAMUEL R. FREEMAN
 Denver and Rio Grande
 Western Railroad Co.
 Park Central Plaza
 Denver, Colorado 80217

HANFORD O'HARA
 Bessemer and Lake Erie
 Railroad Co.
 135 Jamison Lane
 P.O. Box 68
 Monroeville, PA 15146

STUART F. GASSNER
 Chicago and North Western
 Transportation Co.
 400 West Madison Street
 Chicago, Illinois 60606

C. HAROLD PETERSON
 Soo Line Railway Co.
 Box 530
 Minneapolis, MN 55440

JAMES L. HOWE, III
 Norfolk Southern Corp.
 204 South Jefferson Street
 Roanoke, VA 24042

DONAL L. TURKEL
 Burlington Northern
 Railway Co.
 176 East Fifth Street
 St. Paul, MN 55101

RICHARD W. KIENLE
 Norfolk & Western
 Railway Co.
 8 North Jefferson Street
 Roanoke, VA 24042

CHARLES C. RETTBERG, JR.
 Chessie System
 3000 Terminal Tower
 Cleveland, Ohio 44101

HOWARD KOONTZ
Illinois Central Gulf
Railroad Co.
233 North Michigan Avenue
Chicago, Illinois 60601

THORMUND A. MILLER
CAROL HARRIS
Southern Pacific
Transportation Co.
One Market Plaza
San Francisco, CA 94105

MILTON E. NELSON, JR.
The Atchison, Topeka and
Santa Fe Railway Co.
80 East Jackson Boulevard
Chicago, Illinois 60604

ALBERT B. RUSS, JR.
Seaboard System
500 Water Street
Jacksonville, Florida 32202

JAMES E. SYKES
Missouri Pacific Railroad Co.
Missouri Pacific Building
210 North 13th Street
St. Louis, Missouri 63101

J. THOMAS TIDD
Association of American
Railroads
1920 L Street, N.W.
Washington, D.C. 20036

Attorneys for the Respondent Railroads

March 1984

**Counsel of Record*

APPENDIX

APPENDIX

LIST OF PARENTS, SUBSIDIARIES, AND AFFILIATES OF RESPONDENT RAILROADS, PURSUANT TO SUP. CT. R.

28.1

1. The CSX Corporation is the parent of respondents:

BALTIMORE & OHIO RAILROAD COMPANY
CHESAPEAKE AND OHIO RAILWAY COMPANY
SEABOARD SYSTEM RAILROAD, INC.
WESTERN MARYLAND RAILWAY COMPANY

A list of affiliates or subsidiaries appears as Attachment 1.

2. Burlington Northern, Inc., is the parent of respondent BURLINGTON NORTHERN RAILROAD COMPANY. A list of affiliates or subsidiaries appears as Attachment 2.

3. The Chicago Northwestern System is the parent of respondent CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY. A list of affiliates or subsidiaries appears as Attachment 3.

4. Illinois Central Industries, Inc., is the parent of respondent ILLINOIS CENTRAL GULF RAILROAD COMPANY. A list of affiliates or subsidiaries appears as Attachment 4.

5. Union Pacific Corporation is the parent of respondents MISSOURI PACIFIC RAILROAD COMPANY and UNION PACIFIC RAILROAD COMPANY. A list of affiliates or subsidiaries appears as Attachment 5.

6. Norfolk Southern Corporation is the parent of respondents NORFOLK & WESTERN RAILWAY COMPANY and SOUTHERN RAILWAY COMPANY. A list of affiliates or subsidiaries appears as Attachment 6.

7. Santa Fe Southern Pacific Corp. is the parent of respondent SANTA FE INDUSTRIES, INC.; it is also the parent of Southern Pacific Company, which is the parent of respondent SOUTHERN PACIFIC TRANSPORTATION COMPANY. A list of affiliates or subsidiaries appears as Attachment 7.

8. Canadian Pacific Limited is the parent of respondent SOO LINE RAILROAD COMPANY. A list of affiliates or subsidiaries appears as Attachment 8.

9. The United States Steel Corporation is the parent of respondent BESSEMER AND LAKE ERIE RAILROAD CORPORATION; and Rio Grande Industries, Inc., is the parent of respondent DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY. No affiliate or subsidiary of either respondent has any securities outstanding in the hands of the public.

10. Respondent CONSOLIDATED RAIL CORPORATION has no parent. Its only subsidiary with securities outstanding in the hands of the public is Canada Southern Railway Company.

11. Respondent ASSOCIATION OF AMERICAN RAILROADS is an association of railroads operating in the United States, Canada, and Mexico, whose members comprise over 90% of the trackage and freight revenue in the United States.

ATTACHMENT 1

Respondents: Baltimore & Ohio Railroad Company
Chesapeake and Ohio Railway Company
Seaboard System Railroad, Inc.
Western Maryland Railway Company

Related Companies: Akron and Barberton Belt Railroad
Company, The
Akron Union Passenger Depot Company,
The
Allegheny and Western Railway Company
Atlanta and West Point Rail Road Company
Augusta and Summerville Railroad Company
Baltimore and Cumberland Valley Rail Road
Extension Company, The
Baltimore and Ohio Chicago Terminal
Railroad Company

Baltimore and Philadelphia Railroad
Company, The
Beaver Street Tower Company
Belt Railway Company of Chicago
Buffalo, Rochester and Pittsburgh Railway
Company
Chicago South Shore and South Bend
Railroad
Central Florida Pipeline Corporation
Central Railroad Company of South Carolina,
The
Central Transfer Railway and Storage
Company
Chatham Terminal Company
Chicago and Western Indiana Railroad
Company
Clearfield and Mahoning Railway Company
Cleveland Terminal & Valley Railroad
Company, The
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
First Georgia Development Corporation
Fruit Growers Express Company
Green Real Estate Company
Home Avenue Railroad Company
Lakefront Dock and Railroad Terminal
Company, The
Louisville, Henderson & St. Louis Railway
Company
Louisville & Nashville Railroad Company
Monongahela Railway Company, The
Nashville & Decatur Railroad Company
National Mine Service Company
Nicholas, Fayette and Greenbrier Railroad
Company
Norfolk and Portsmouth Belt Line Railroad
Company
Paducah & Illinois Railroad Company

Richmond, Fredricksburg & Potomac
Railroad Company
Richmond-Washington Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Tylerdale Connecting Railroad Company,
The
Winchester and Potomac Railroad Company,
The
Winston-Salem Southbound Railway
Company
Woodstock & Blocton Railway Company

ATTACHMENT 2

Respondent: Burlington Northern Railroad Company

Related Companies: Belt Railway Company of Chicago, The
BN Financial Services, Inc.
Burlington Northern Airmotive, Inc.
Burlington Northern International Services,
Inc.
Burlington Northern Railway Company
Butte Pipe Line Company
Camas Praire Railroad Company
Chicago Union Station Company
Colt Intermodal Inc.
Davenport, Rock Island and North Western
Railway Company
Denver Union Terminal Railway Company,
The
El Paso Company
Galveston Terminal Railway Company
Glacier Park Company
Glacier Park Liquidating Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company

Keokuk Union Depot Company
Lake Superior Terminal and Transfer
Railway Company, The
Longview Switching Company
Meridian Land & Mineral Company
Milestone Petroleum, Inc.
Minnesota Transfer Railway Company, The
New Mexico and Arizona Land Company
Paducah & Illinois Railroad Company
Plum Creek Timber Company, Inc.
Portal Pipeline Company
Portland Terminal Railroad Company
Pueblo Union Depot and Railroad Company,
The
R-M Holdings Corporation
St. Paul Union Depot Company, The
Trailer Train Company
Wichita Union Terminal Railway Company,
The
Winona Bridge Railway Company

ATTACHMENT 3

Respondent: Chicago and Northwestern Transportation
Company

*Related
Companies:* Iowa Transfer Railway Company Kansas
City
Terminal Railway Company Lake Superior
Terminal & Transfer
Railway Company of the State of
Wisconsin, The
Minnesota Transfer Railway Company, The
Peoria and Pekin Union Railway Company
Railbox Company
St. Paul Union Depot Company
Trailer Train Company

ATTACHMENT 4

Respondent: Illinois Central Gulf Railroad Company

Related Companies:

- A. B. Estrella
- Abex Finangaria, S.r.l.
- Abex Finanziaria
- Abex Fluid Power Limited
- A. B. Estrella
- Abex A/S
- Abex Corporation
- Abex Denison Limited
- Abex Finangaria, S.r.l.
- Abex Finanziaria
- Abex Fluid Power Limited
- Abex Ges. m.b.H.
- Abex G.m.b.H.
- Abex Industrial, S.A.
- Abex Industries, A.B.
- Abex Industries Ltd.
- Abex Industries, S.A.
- Abex International Holdings Limited
- Abex International, S.A.
- Abex Mead Limited
- Abex Paqid Equipement S.A.
- Abex Pagid Reibbelag G.m.b.H.
- Ac'cent International De Mexico, S.A. De C.V.
- Ac'cent International, Inc.
- ACR Maine, Inc.
- Almacenes Refrigerantes, S.A. De C.U.
- Alton Manufacturing Company
- American Brake Shoe Company
- American Refrigeration Products, S.A.
- Amsco Mexicana S.A.
- Atherton Silencers Limited
- Au Gourmet Foods De Luxe, Inc.

Basingstake Foods Limited
Belt Ry. Co.
Birmingham Exhaust Equipment Company
Limited
Black Diamond, Inc.
Blanchard-Nus Limited
Blue Island Railroad Company
Bolingbrook 55 Corp.
Boston Bean Pot, Inc.
Bridgewater Machine Company
Bubble-Up Company, Inc.
Buffalo Refrigerating Company, Inc.
Butcher Boy Refrigerator Door Co.
Centigon, Inc.
Chandeysson Electric Company
Chesley Industries, Inc.
Chicago Intermodal Company
Colony Financial Corporation
Compet Corporation
Cobreq Cia. Brasileira de Equipamentos
Cornish Canners Limited
Cosmic Enterprises, Inc.
Cosmic Stores, Inc.
Cove Development Corporation
Covex S.r.L.
Cutcher Canning Co., Inc.
Cypress Bend Corporation
Dad's Root Beer Company
Denison Hydraulics Company, The
Denison Hydraulics India Limited
Denison Hydraulics, Japan Ltd.
Diablitos Mexicanos, S.A.
Diablitos Venegolanas, C.A.
Do-Ray Lamp Co. Ltd.
Environ of Inverrary, Inc.
Exhaust Specialists Limited
Frendo-Abex S.p.A.
Fren-Do Sud S.p.A.

Friend Brothers, Inc.
Frolic Homes, Inc.
Gas Welding, Inc.
Genadco Advertising Agency, Inc.
Grupo De Frigeracion Industrial y
Comercial,
S.A. de C.V.
GM&O Land Company
Gulf Transport Company
Harry Peck & Co.
Havana Pepsi-Cola Bottling Co.
Helvetia Leasing Corporation
Helvetia Milk Condensing Company, Inc.
Helvetia Properties, Inc.
Helvetia Redevelopment Corporation
Hi-Q Products Company
Hussmann Acceptance Co.
Hussmann Acceptance Co. Canada Limited
Hussmann Corporation
Hussmann Distributing Company, Inc.
Husmann Equipment Limited
Husmann International Inc.
Hussman Refrigeration Ltd.
Hussmann Store Equipment, Ltd.
Huth Manufacturing Corporation
IC Acquisition Company
IC Equipment Leasing Inc.
IC Industries, Inc.
IC Industries Finance Corporation, N.V.
IC Industries Insurance Co. Ltd.
IC Leasing, Inc.
IC Products Company
Iconic, Inc.
ICP Holding Corp.
Illinois Center Corporation
Illinois Central Export Corporation
Illinois Central Industries, Inc.
Industrias Frigorificas, S.A. de C.V.

- International Parts Corporation
International Parts Manufacturing, Ltd.
International Stamping Company, Inc.
J. H. Senior and Company Limited
Jefferson SWRR Co.
Joliet Union Depot Co.
Kansas City Terminal Co.
Ken-Craft Products, Inc.
Kensington and Eastern RR Co.
Kentuckiana Bottlers, Inc.
Kolmer Products Corporation
Krack Corporation
Lakes Entrance Processors Pty. Limited
Laura Scudder's, Inc.
Le Silencieux, S. A.
Lincoln Financial, Inc.
Lloyds Abex Limited
Lloyds (Burton) Ltd.
Mayflower Products Limited
Mexican Holding Co.
Mid-America Improvement Corporation
Midas Australia Pty. Ltd.
Midas Automotive Ltd.
Midas Canada, Inc.
Midas Euro., Inc.
Midas International Corporation
Midas Muffler (Vic.) Pty., Limited
Midas Properties, Inc.
Midas Realty Corporation
Midas Realty Corporation of Canada
Midas S.A.
Midas Silencers Centres U.K. Limited
Midas Silencers Ltd.
Midas Steel Processing Services, Inc.
Midas Truck Body, Inc.
Milady Foods, Inc.
Mississippi Valley Corporation
Missouri Speciality Spirits, Inc.

Muffler Corporation of America
905 Wine and Spirits, Inc.
Norris Homes, Inc.
North Carolina Corp.
Oak Village Development Corp.
Old Brazos Forge, Inc.
1, 2, 3 Auto Service GmbH
1, 2, 3 Auto Service GmbH & Co.
Paducah & Illinois RR Co.
Palmer Refrigeration Limited
Parmaco Products, Ltd.
Peoria & Pekin Union Ry. Co.
Pepsi-Cola General Bottlers, Inc.
Pet Incorporated (Delaware)
Pet Incorporated (Wyoming)
Pet International Sales Inc.
Pet Milk Company
Petrodyne S.A.
Petsub, Inc.
Pet Warehousing Company of California
Port 400 Holding Company
Potteries Exhaust Centre Limited
Refrigeracion Frio Lux, S.A.I.
Richardson & Robbins Co.
S.A. Ateliers et Fonderies B. Piret
S&T of Mississippi, Inc.
S&T South, Ino.
St. Louis Lithographing Company
C. Shippam, Limited
Siprof S.A.
South Chicago Railroad Co., The
South Properties, Inc.
Southland Canning & Packing Co., Inc.
Spartanburg Dairy, Inc.
Stanray Corporation
Star Cooler Corporation
Stephen F. Whitman & Son, Inc.
Stuckey's, Inc.

Stuckey's Stores, Inc.
Sundaram-Abex Limited
Terminal RR Assn.—St. Louis
TI Midas Limited
Trailer Train Co.
Uni-Abex Alloy Products Limited
Vendome Stores, Inc.
Violet Packing Co., The
Walsall Exhaust Centre Limited
Waterloo Railroad Company
William Underwood Company
Wine & Spirits Enterprises, Inc.
Winebrenner Corporation, The
Wolverhampton Exhaust Centre Limited

ATTACHMENT 5

Respondents: Missouri Pacific Railroad Company
Union Pacific Railroad Company

Related Companies: Alton & Southern Railway Company, The
American Refrigerator Transit Company
Arkansas & Memphis Railway Bridge and
Terminal Company
Belt Railway of Chicago
Bitter Creek Coal Company
Brownsville & Matamoros Bridge Company
Calnev Pipe Line Company
Camas Prairie Railroad Company
Champlin Canada Ltd.
Champlin Gas Pipeline, Inc.
Champlin Gas Processing Company
Champlin International Petroleum Company
Champlin Mid-Continent Corporation
Champlin Mid-Continent Crude Oil Pipeline,
Inc.
Champlin Mid-Continent Marketing, Inc.

Champlin Mid-Continent Products Pipeline,
Inc.
Champlin Mid-Continent Refining, Inc.
Champlin Petrochemicals, Inc.
Champlin Petroleum Company
Champlin Pipeline, Inc.
Champlin Trading Company
Chicago & Western Indiana Railway
Company
Chicago Heights Terminal Transfer Railroad
Company
Denver Union Terminal Railway Company,
The
Des Chutes Railroad Company
Doniphan, Kensett & Searcy Railway
Elk Mountain Coal Company
Galveston, Houston and Henderson Railroad
Company
Great Southwest Railroad, Inc.
Hanna Basin Coal Company
Harbor Service Stations, Inc.
Houston Belt & Terminal Railway Company
Jefferson Southwestern Railroad Company
Kanda Development Company
Kansas City Terminal Railway Company
Longview Switching Company
Los Angeles & Salt Lake Railroad Company
Missouri Improvement Company
Missouri Pacific Airfreight, Inc.
Missouri Pacific Equipment Corp.
Missouri Pacific Intermodal Transport, Inc.
Missouri Pacific Truck Lines, Inc.
Mount Hood Railway Company
MP Redevelopment Corporation
MRT Exploration Company
Ogden Union Railway and Depot Company,
The

Oregon Short Line Railroad Company
Oregon-Washington Railroad & Navigation
Company
Overthrust Pipeline, Inc.
Pacific Rail System, Inc.
Pacific Subsidiary, Inc.
Park Spring, Inc.
Panola Pipeline, Inc.
Portland Terminal Railroad Company
Portland Traction Company
Prospect Point Coal Company
Pueblo Union Depot and Railroad Company,
The
Ric-Con Corporation
Rock Springs Royalty Company
Rocky Mountain Energy Company
RM Leasing Company
St. Joseph and Grand Island Railway
Company, The
St. Joseph Terminal Railroad Company
Southern Illinois and Missouri Bridge
Company
Spokane International Railroad Company
Stauffer Chemical Company of Wyoming
Stonegate Park, Inc.
Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
Texas & Missouri Pacific Railroad Company
Trailer Train Company
Uinta Development Company
Union Pacific Finance N.P.
Union Pacific Foundation
Union Pacific Freight Services Company
Union Pacific Fruit Express Company
Union Pacific Land Resources Corporation
Union Pacific Motor Freight
Union Pacific Resources Corporation

Union Pacific Resources Ltd.
Upland Industries Corporation
UP Leasing Corporation
Wasatch Indusance Limited
Weatherford Mineral Wells and
Northwestern Railway Co., The
Winton Coal Company
Yakima Valley Transportation Company

ATTACHMENT 6

Respondents: Norfolk & Western Railway Company
Southern Railway Company

Related Companies: Airforce Pipeline, Inc.
Alabama Great Southern Railroad Company,
The
Algiers, Winslow and Western Railway
Company
Arrowood-Southern Company
Arrowood-Southern Executive Park, Inc.
Athens Belt Line Railroad Company
Atlanta and Charlotte Air Line Railway
Company, The
Atlanta Terminal Company
Atlantic and East Carolina Railway Company
Atlantic and North Carolina Railroad
Company
Augusta and Summerville Railroad Company
Beaver Street Tower Company
Birmingham Terminal Company
Blue Ridge Railway Company
Camp Lejeune Railroad Company
Central of Georgia Railroad Company
Central Transfer Railway and Storage
Company
Charlotte-Southern Corporation
Chatham Terminal Company
Chattanooga Station Company

Chattanooga Terminal Railway Company
Chesapeake Western Railway
Cincinnati, New Orleans & Texas Pacific
 Railway Company
Cincinnati Southern Railway
Citico Realty Company
Danville and Western Railway Company
Dereco, Inc.
Durham and South Carolina Railroad
 Company
Elberton Southern Railway Company
Fairport, Painesville and Eastern Railway
 Company
Fort Wayne Union Railway Company
1575 Eye Street Associates (Limited
 Partnership)
Georgia Midland Railway Company, The
Georgia Northern Railway Company, The
Georgia Southern and Florida Railway
 Company
High Point, Randleman, Asheboro and
 Southern Railroad Company
Interstate Railroad Company
Lake Erie Dock Company
Lambert's Point Docks, Incorporated
Lenoir Car Works
Live Oak, Perry and South Georgia Railway
 Company
Louisiana Southern Railway Company
Memphis and Charleston Railway Company
Mobile and Birmingham Railroad Company
Norfolk Southern Railway Company
Northern Ohio Food Terminal, Inc.
NW Equipment Corporation
Pacahontas Development Corporation
Pocahontas Kentucky Corporation
Pocahontas Land Corporation

Akron & Barberton Belt Railroad Company,
The
Nickel Plate Improvement Company, Inc.,
The
Scioto Valley and New England Railroad
Company, The
Shenandoah-Virginia Corporation
Toledo Belt Railway Company, The
National Investment Company, The
New Orleans Terminal Company
Norfolk and Portsmouth Belt Line Railroad
Company
Norfolk Southern Industrial Development
Corporation
North Carolina Midland Railroad Company,
The
North Carolina Railroad Company, The
North Charleston Terminal Company
Ocean Steamship Company of Savannah
Pine Brook Center Limited (Limited
Partnership)
Queen City Developers (Limited Partnership)
Richmond, Fredericksburg and Potomac
Railroad Company
Richmond-Washington Company
St. Johns River Terminal Company
700 North Fairfax Street Limited
Partnership
The South Western Rail Road Company
Southern Rail Terminals, Inc.
Southern Rail Terminals of Alabama Inc.
Southern Rail Terminals of North Carolina,
Inc.
Southern Railway-Carolina Division
Southern Region Coal Trnsport, Inc.
Southern Region Distribution Services, Inc.
Southern Region Industrial Realty, Inc.
Southern Region Investment Company

Southern Region Materials Supply, Inc.
Southern Region Motor Transport, Inc.
State University Railroad Company
Tennessee, Alabama & Georgia Railway
Company
Tennessee Railway Company
Terminal Properties, Inc.
Terminal Railroad Association of St. Louis
Trailer Train Company
Transylvania Railroad Company
Virginia Holding Corporation
Virginia and Southwestern Railway Company
Wabash Railroad Company
Wheeling and Lake Erie Railway Company,
The
Woodstock & Blocton Railway Company
Yadkin Railroad Company

ATTACHMENT 7

Respondents: Santa Fe Industries, Inc.
Southern Pacific Transportation Company

Related Companies: Arkansas & Memphis Railway Bridge &
Terminal Company
Bankers Leasing and Financial Corporation
Central California Traction Company
Evergreen Leasing Corporation
Ogden Union Railway & Depot Company,
The
Pacific Fruit Express Company
Portland Terminal Railroad Company
Portland Traction Company
Santa Fe Energy Company
Santa Fe Natural Resources, Inc.
St. Louis Southwestern Railway Company
Trailer Train Company

ATTACHMENT 8

Respondent: Soo Line Railroad Company

Related Companies:

- Algoma Steel Corporation, Limited, The
- AMCA Holdings (U.K.) Limited
- AMCA International Limited
- American Reinforcing Inc.
- Amtel Chimie et Plastiques
- Arrendadora Korco, S.A. de C.V. (Mexico)
- Bilsa, S.A.
- Bomag Australia PTY Ltd.
- Bomag-Nenck B.m.b.H.
- Bomag S.A.F.
- Brosses Osborn S.A.
- Brushes International PLC (U.K.)
- Brushes International do Brazil
- Canada Line Agencies Limited, The
- Canada Line Limited, The
- Canada Line Services Limited, The
- Canadian Pacific Enterprises Limited
- Canadian Pacific Oil and Gas Norway A/S
- CanPac Maritime Agencies Limited
- Cascade Pipe Line Limited
- Cherry Burrell Holdings Corporation
- Cominco Ltd.
- Compaloc
- Corporate Foods Limited
- Dandix, Inc. (U.S.A.)
- Dendix Brushes Limited (U.K.)
- Desa Industries (U.K.) Limited
- Dominion Atlantic Railway Company, The
- Dominion Bridge Sultzer, Inc.
- Eastern Bakeries Limited
- Energy Development (Management) Limited
- Falt Towing Ltd.
- Gem Power Brushes, Limited (U.K.)
- Giddings & Lewis Foundation Inc.

Great Lakes Forest Products Limited
Greenex A/S
Hawaiian Western Steel Limited
Instrumentation Services, S.A.
Imodeo International Inc.
KCL Leasing
Kingston and Pembroke Railway Company,
The
Koering Leasing
Koering Leasing Partners
Kremzar Gold Mines Limited
Lake Champlain and St. Lawrence Junction
Railway Company, The
Lake Erie and Northern Railway Company,
The
Lake St. Joseph Iron Inc.
Litwin Arabia Ltd.
Litwin (U.K.) Limited
Manitoba and North Western Railway
Company of Canada
Maple Shipping Company (U.K.) Limited
Marathon Aviation Terminals Limited
Massawippi Valley Railway Company
Mayo Forest Products Ltd.
Montreal and Atlantic Railway Company, the
National Hardware Specialties Limited
Nippon Bomag C., Ltd. (Japan)
OTM Limited
Ontario and Quebec Railway Company
Orbs-Johnson Systems, Inc.
Osborn Foundry Machinery, Ltd.
Osborn International G.m.b.H. (W.
Germany)
PanCanadian Petroleum Denmark A/S
PanCanadian Petroleum Limited
Pine Point Mines Limited
Pitt Street Developments Limited
Polytec S.A.R.L.

Princeton Gold Mines Limited
Ptarmigan Mines Limited
Robison Mines Limited
Rycon Mines Limited
Societe Anonyme des Machines Osborn
(France)
St. Lawrence and Ottawa Railway Company,
The
Steep Rock Resources Inc.
Sunloch Mines Limited
Sunro Mines Limited (N.P.L.)
T.E.B.A. B.V.I.O. (The Netherlands)
Telesat Canada
Toronto, Grey and Bruce Railway Company
Toronto Terminals Railway Company, The
Trailer Train Company
Vestgron Mines Limited
Village Green Mall Ltd.
Vol Mines Limited
Webb Jarratt & Company Limited
Western Fabricators Inc.
Western Metal Products Inc.

202 E D

MAR 14 1984

ER L STEVENS
CLERK

IN THE
Supreme Court of the United States
October Term, 1983

WESTERN COAL TRAFFIC LEAGUE, ET. AL.,

Petitioners,

v.

**UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION**

Respondents,

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

**BRIEF OF AMICI CURIAE
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

Robert C. Eckhardt
1750 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 393-5710

Counsel of Record

TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	iii
Argument	2

THE COMMISSION MAY NOT, BY ESTABLISHING ITS OWN DEFINITION OF "MARKET DOMINANCE", RELIEVE ITSELF OF ITS STATUTORY DUTY TO REGULATE RAILROAD RATES WHEN EFFECTIVE COMPETITION DOES NOT EXIST FOR THE TRAFFIC OR MOVEMENT FROM THE PLACE OF ORIGIN TO THE PLACE OF DESTINATION 2	
<ul style="list-style-type: none"> I. This Concept Is Explicit In The Language Of The 4-R Act And Its Interpretation In Ex Parte No. 320 2 <li style="margin-top: 1em;">A. Where there is only competition from another geographic location or competition from another product not the subject of the issue traffic, such is not "effective competition" by a <i>carrier</i> for that transportation <i>to which the rate applies</i> 2 <li style="margin-top: 1em;">B. When it decided Ex Parte No. 320 (Sub-No. 2) the Commission had no authority to define market dominance 5 <li style="margin-top: 1em;">I. The authority of 49 U.S.C. 1(5) (d) was limited to the time of the initial setting up of a program under the 4-R Act 5 	

2. When the ICC promulgated Ex Parte No. 320 (Sub-No. 2) it had no authority under § 1 (5) (d), and its general rulemaking authority did not direct or permit a new and different construction of "market dominance"	7
C. The Court erred in determining that it was without authority to independently construe "market dominance"	9
 II. The Staggers Act And Its Legislative History Show That Congress Rejected A Proposed Alteration To Include Geographic And Product Competition In Determining "Marketing Dominance"	13
A. The "market dominance" threshold for ICC jurisdiction was considered fixed and definite, changeable only by statutory amendment, when Congress embarked on amending the Interstate Commerce Act in 1980	13
B. The major dispute on the bill was settled by a compromise that fully retained the 4-R Act's concept of market dominance	16
C. Ex Parte No. 320 (Sub-No. 2), if allowed to stand, would permit the "railroad side" to retain all the advantages they obtained in the compromise and take away, by an administrative return to the original committee bill, all the fruits of the compromise gained by the "shipper side"	18
 CONCLUSION	20

TABLE OF AUTHORITIES

Cases:	Page
<i>Aberdeen & Rockfish R. Co. v. United States</i> , 682 F.2d 1092 (5th Cir. 1982)	10
<i>American Trucking Association v. AT & SF Ry. Co.</i> , 387 U.S. 397 (1967)	9
<i>Batterson v. Francis</i> , 432 U.S. 416 (1977)	10, 11
<i>Bureau of Alcohol, Tobacco and Firearms v. F.L.R.A.</i> , — U.S. —, 104 S.Ct. 439 (1983)	12
<i>Ex Parte No. 320, Special Procedures for Making Findings of Market Dominance as Required by the Railroad Revitalization and Regulatory Reform Act of 1976</i> , 353 ICC 874 (1976)	3, 8, 9, 14
<i>Ex Parte No. 320, Special Procedure for Making Findings of Market Dominance as Required by the Railroad Revitalization and Regulatory Reform Act of 1976</i> , 353 ICC 12 (1976)	8
<i>Ex Parte No. 320 (Sub-No. 2) Market Dominance Determinations and Considerations of Product Competition</i> , 365 ICC 118 (1981)	4, 8
<i>Global Van Lines v. ICC</i> , 714 F.2d 1290 (5th Cir. 1983) ...	7
<i>National Muffler Dealers Assn. v. United States</i> , 440 U.S. 472 (1979)	11
<i>N.L.R.B. v. Brown</i> , 380 U.S. 278 (1965)	12
<i>Public Service Commission v. FPC</i> , 511 F.2d 338 (D.C. Cir. 1975)	12
<i>Rowan Companies, Inc. v. United States</i> , 452 U.S. 247 (1981)	10, 11

<i>Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission</i> , 390 U.S. 261 (1968)	11
<i>Western Coal Traffic League v. U.S.</i> , 719 F.2d 772 (5th Cir. 1983)	Passim
<i>Western Coal Traffic League v. U.S.</i> , 694 F.2d 378 (5th Cir. 1982), <i>rev'd en banc</i> , 719 F.2d 772 (5th Cir. 1983)	6

Unreported Cases:

Docket No. 37226, <i>Incentive Rates on Coal—Axial, CO, to Coleto Creek, TX</i> , unprinted decision, (served January 15, 1980)	14, 15
---	--------

Statutes:

Railroad Revitalization and Regulatory Reform Act (4-R Act), Pub.L. No. 94-210, 90 Stat. 31 (1976)	Passim
Section 202(b) of the 4-R Act, codified at Former 49 U.S.C. § 1(5) (b), (c) and (d)	Passim
Revised Interstate Commerce Act, Pub.L. No. 95-473, 92 Stat. 1337 incorporated at 49 U.S.C. § 10101 <i>et seq.</i>	6
49 U.S.C. § 10321(a)	7, 9
49 U.S.C. § 10709	17
Staggers Rail Act, Pub.L. No. 96-448, 94 Stat. 1895, codified in various sections of 49 U.S.C. § 10101 <i>et seq.</i>	Passim
Section 205 of the Staggers Rail Act, set forth in Historical Note to 49 U.S.C. § 10701a	17

Miscellaneous:

- 126 Cong. Rec. H8341-51 (daily ed. Sept. 5, 1980) 16
126 Cong. Rec. H8551 (daily ed. Sept. 9, 1980)
 (statement of Congressman Rahall) 18
H. Rep. No. 96-1430, 96th Cong., 2d Sess. 88-89,
 reprinted in 1980 U.S. Code Cong. & Ad News 4120 18
H.R. 7325, 96th Cong. 2d Sess. 15
Report by House Subcommittee on Oversight and
Investigations of the Committee on Interstate and
Foreign Commerce, 96th Cong., 2d Sess., *Railroad
Coal Rates and Public Participation: Oversight of ICC
Decisionmaking* (Comm. Print 96-IFC 40) (1980) 14
Kenneth Culp Davis, *Administrative Law Treatise* 113,
 § 28.21 12
R. Eckhardt, *Market Dominance in The Staggers Act,*
 ICC Practitioners' Journal, Vol. 48, No. 6 (1981) 16
R. Eckhardt, *The Western Coal Traffic League Case,*
 Transportation Law Journal, Vol. 13, No. 2 (1984) 19

IN THE
Supreme Court of the United States

WESTERN COAL TRAFFIC LEAGUE, ET. AL.,

Petitioners,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

Respondents,

**BRIEF OF AMICI CURIAE
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

This brief in support of the Petition for Writ of Certiorari is submitted by Russell Long, Lloyd Bentsen, Nick Joe Rahall, Tom Loeffler, Jack Brooks, J.J. Pickle, Sam B. Hall, Michael A. Andrews, Bill Patman, and Alan Mollohan.

Letters showing the consent of all the parties for amici to file this brief have been filed with the clerk.

The amici are all members of the United States Congress and most of them were in the 96th Congress when the Staggers Rail Act was passed in 1980. Amicus Nick Rahall was co-author¹ of the amendment to the Staggers Act which established jurisdictional standards, and which continued

¹With the Chairman of the House Interstate and Foreign Commerce Committee, Harley Staggers.

the existing definition of "market dominance" of the 4-R Act as a jurisdictional standard in the Interstate Commerce Act which is the law today.

The central question at issue in this case is:

Whether the ICC may consider evidence of product and geographic competition in determining the threshold requirement of "market dominance" essential to its jurisdiction to consider the reasonableness of rail rates.

If the Court is to reach this question, a barrier which the Fifth Circuit Court raised must be surmounted:

Whether Congress left the resolution of the central question for the exclusive determination of the ICC; or, on the other hand, whether a court must construe the meaning of the statutory language defining "market dominance".

We will argue that the central question must be answered in the negative and that a court must decide such question.

ARGUMENT

THE COMMISSION MAY NOT, BY ESTABLISHING ITS OWN DEFINITION OF "MARKET DOMINANCE", RELIEVE ITSELF OF ITS STATUTORY DUTY TO REGULATE RAILROAD RATES WHEN EFFECTIVE COMPETITION DOES NOT EXIST FOR THE TRAFFIC OR MOVEMENT FROM THE PLACE OF ORIGIN TO THE PLACE OF DESTINATION.

I

THIS CONCEPT IS EXPLICIT IN THE

LANGUAGE OF THE 4-R ACT AND IN ITS INTERPRETATION IN EX PARTE NO. 320.

A. Where there is only competition from another geographic location or competition from another product not the subject of the issue traffic, such is not "effective competition" by a *carrier* for that transportation *to which the rate applies*.

"Market dominance," as it appears in the statute, relates only to the traffic or movement involved, not to all possibilities of competition for the shipper's custom or trade, and the Commission recognized this. In a proceeding held under the temporary mandate of the statutory directive of § 1(5) (d), it found "that the appropriate market is the market for transportation services which directly compete with service outlined in the tariff under consideration," and that this interpretation is "consistent with the express language of the legislative definition."²

The Commission went on to address the contrary interpretation advanced by the railroads, stating:

The contention of some of the parties that use of the word "traffic" in conjunction with the word "movement" requires consideration of a broad range of movements of various commodities moving from various sources to various destinations must be rejected. The 4R Act speaks of "the traffic or movement to which the rate applies." When used in this context in the transportation industry, the word

²Ex Parte No. 320 (interim report), 353 ICC 875 at 904. Ex Parte No. 320 was decided at the only time that the ICC had congressionally delegated authority to provide standards and procedures for determining whether and when a railroad possesses "market dominance".

"movement" refers to transportation from a single origin point to a single destination point, while the word "traffic" commonly denotes transportation services from a named set of points to another point or set of points; from specific origin points or areas to rate groups or blanket areas; or between stated mileage (on particular commodities) in a given territory.³

From the language quoted above it is apparent that the Commission was not merely choosing to accept jurisdiction within a range of permissive authority in which it could eschew jurisdiction. It was accepting the proposition that, within the constraints of the language of the statute, it could not eschew jurisdiction on the basis of the existence of geographic or product competition.⁴

When the ICC purported to alter its contemporaneous interpretation of "market dominance" by redefining "effective competition" to include "geographic" and "product" competition,⁵ it did not just develop "standards and procedures" for determining "whether and when a [railroad] possesses market dominance"; it adopted, contrary to the mandate of the specific language of the Act and to the import of its legislative history, a new and different definition of "market dominance".

The majority on the three judge panel that first decided this case⁶ correctly held that the jurisdictional question of "market dominance" was determined by the statutory language of Sec. 202(b) of the 4-R Act, which amended 49 U.S.C. § 1(5) by adding a new subsection (c). That subsection, in pertinent part, reads:

³*Id.*, at 904, last paragraph.

⁴It found such construction "essential to making practical determinations in a short time period" and § 1(5) (d) directed that it make "a practical determination without administrative delay." *Id.*, at 904.

⁵In *Ex Parte No. 320 (Sub-No. 2)*, 365 ICC 118, July 8, 1981.

⁶*Western Coal Traffic League v. U.S.* 694 F.2d 378 (5th Cir. 1982), *rev'd en banc* 719 F.2d 772 (5th Cir. 1983) (hereinafter WCTL).

"market dominance" refers to an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies . . .

The panel court found the answer to the question of *what competition is involved* in the language of the statute itself. It is the competition from "other carriers or modes of transportation", not from other producers of substitute products (product competition). And it is "for the traffic or movement *to which the rate applies*", not for some other movement to which some other rate might be reasonable (geographic competition).

B. When it decided Ex Parte No. 320 (Sub-No. 2) the Commission had no authority to define market dominance.

1. *The authority of 49 U.S.C. § 1(5)(d) was limited to the time of the initial setting up of a program under the 4-R Act.*

For a period of time after the passage of a statute which establishes new concepts of law, it is not uncommon for Congress to recognize the need of the agency administering the statute to "set up housekeeping" under the new law and to grant temporary authority to the agency to establish the rules and procedures necessary to set the program afoot.

Consonant with this, subsection (b) of §202 added §1(5)(d) to Title 49, authorizing the agency to establish procedures for determining the *application* of jurisdictional yardsticks during this inauguration period.

The Fifth Circuit Court said: "Congress not only expected but required the ICC to undertake the task of developing 'standards and procedures' for determining 'whether and when a [railroad] possesses market

dominance.'⁷ The court then erroneously assumed that this language permits the establishment of standards which would ignore the fact that the competition involved is limited to *carrier* competition for only "the traffic or movement *to which the rate applies*" by the terms of the statute itself.⁸ The standards and procedures contemplated were merely those appropriate for administering the statutory mandate. The Commission was not empowered to enlarge or diminish it in a substantive manner. This point will be considered in greater detail in C, *infra*.

But even if we should assume, for the sake of argument, that the temporary delegation granted under §1(5) (d) gave the ICC, *in the initial period* of establishing its program under the new Act, authority to affect the scope of its own jurisdiction by an enlargement of the concept of competition, the ICC *did not* attempt this during the 240 days while §1(5) (d) was in effect. Obedient to the statute, it found the competition which defeats market dominance to be that which directly competes "with service outlined in the tariff under consideration."⁹

⁷See the court's decision at p. 778. The pertinent statutory language, set forth in the 4-R Act, § 202(b), codified at 49 U.S.C. § 5(d) (1976), repealed by Pub.L. No. 95-473, § 4(b), (c), 92 Stat. 1337, 1466-70 (1978), was:

Within 240 days after the date of the enactment of this subdivision, the Commission shall establish, by rule, standards and procedures for determining in accordance with Section 15(9) of this part, whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rules shall be designed to provide for a practical determination without administrative delay.

⁸WCTL, 719 F.2d at 776.

⁹Ex Parte No. 320 (Interim Report), 353 ICC at 904.

If the construction of the term "effective competition" were not fixed and certain before the Commission acted in Ex Parte No. 320, it became so at that time. Congress appeared to be satisfied with the result, or it would not have approved the codification interpreted by the "standards and procedures" adopted in Ex Parte No. 320. Had it been dissatisfied, it most likely would not have repealed §1(5)(d) but would have enlarged the time during which the Commission could act under it.

2. When the ICC promulgated Ex Parte No. 320 (Sub-No. 2) it had no authority under §1(5)(d), and its general rule making authority did not direct or permit a new and different construction of "market dominance".

After 240 days, §1(5)(d) ceased to have effect. Therefore, at the time the ICC adopted Ex Parte No. 320 (Sub-No. 2), its authority stemmed solely from its general rule-making authority under 49 U.S.C. §10321(a). The extent of that authority is elucidated in *Global Van Lines v. ICC*, 714 F.2d 1290 (5th Cir. 1983) wherein the Court considers in depth this general rule-making authority and its sources and concludes:

. . .the general rulemaking provision imparts power to the ICC only to enforce and carry out the specific substantive mandates enacted by Congress.¹⁸

Such general rule-making authority could not be used to justify defining *carrier* competition "for the traffic or movement to which the rate applies" to mean competition with that movement by another movement, or competition

¹⁸*Global Van Lines v. ICC*, 714 F.2d at 1295.

by *other than a carrier*. Suppliers of some other product (than that transported) at the point of destination are "not carriers." If they may be said to offer competition it is not through competing "modes of transportation", which is the only kind of competition the statute refers to.

To read the statutory language otherwise would not be to enforce or carry out "specific substantive mandates enacted by Congress." Rather, it would be to alter or at least give a very much broader meaning to "competition" than the statutory language spontaneously yields.

The extremely important point that cannot be overemphasized is that Ex Parte No. 320 was of an entirely different *genre* than Ex Parte No. 320 (Sub-No. 2). It was an act of the Commission mandated by Congress to promptly lay out ground rules that would give certainty to the Commission's jurisdictional scope.¹¹ In promulgating Ex Parte No. 320, the Commission was acting in behalf of Congress in a way that it could never act again after the 240 day period. The authority of § 1(5)(d) was expressly allowed, and the time delimited, for settling questions of interpretation, so that the statutory mandates would become fixed and permanent until Congress should itself alter them.

The ICC did not envisage its authority under § 1(5)(d) as permitting the filling in of the interstices of the statutory language but rather as calling for illuminating its specific terms. Viewing its mission in this light, the Commission said:

There is no language in the legislation which would warrant the extension of the phrase "the

¹¹This is shown in its title: *Special Procedures for Making Findings of Market Dominance as Required by the Railroad Revitalization and Regulatory Reform Act of 1976.*

traffic or movement to which the rate applies" beyond transportation services which are comparable to that described in the issue tariff.¹²

When Congress codified the terms so interpreted in the Interstate Commerce Act in 1978, this interpretation of "market dominance" was accepted by Congress. Since the interpretation had the sanction of the specific statutory authority of § 1 (5)(d), it became a part of the law when that authority ceased, and the ICC could not change the settled law under the limited general rule-making authority of § 10321(a).¹³

The Appeals Court never recognizes in the body of the opinion (though it recognized repeal of § 1(5)(d) at n. 7, p. 776) that the ICC could no longer rely on that section's authority when it promulgated Ex Parte No. 320 (Sub-No. 2). At such time the only authority available for rule-making was § 10321(a) which contained no specific mandate directing the Commission to further construe "market dominance".

C. The court erred in determining that it was without authority to independently construe "market dominance".

The ICC takes the position that, by construing from time to time "effective competition", it can alter its mandate to require just and reasonable rates where a railroad has

¹²Ex Parte No. 320 (Interim Report) 353 ICC at 905.

¹³The *en banc* Court's decision quotes *American Trucking Association v. AT & SF Ry. Co.*, 387 U.S. 397 (1967) for the proposition that agencies "are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." But the Court does not quote the condition placed upon exercise of this flexibility which appears in the preceding sentence: that such changes be "within the limits of the law."

market dominance. The appeals court upheld this position on ground of the Commission's superior expertise, saying that such construction of statutory language may not be judicially reviewed, even though "the members of the Court might have construed the statute differently."¹⁴

Section 1(5)(d) had given the Commission authority to establish standards and procedures to carry out the mandate of the 4-R Act (though not to alter that mandate) but, as we have seen, that authority had expired. Thus, *Batterton v. Francis*, 432 U.S. 416 (1977), relied on by the *en banc* court, is inapposite. In *Batterton v. Francis* the agency was *directed* to define the term "unemployment".¹⁵ If the ICC were ever directed to define "market dominance" as a jurisdictional base, that time had long since passed.

The principle applicable to the instant case is ably spelled out in *Rowan Companies, Inc. v. United States*, 452 U.S. 247 (1981), a case involving a challenge to Internal Revenue Service regulations interpreting the word "wages" for social security and unemployment tax purposes. The Court noted that since Congress itself had defined wages, less deference was due the IRS interpretation than where the agency acted under specific grant of authority to define a statutory term. (452 U.S. at 253.)

The Court went on to observe that later interpretations are entitled to less weight than a contemporaneous interpretation, and that "the consistency of the

¹⁴ *WCTL*, 719 F.2d at 777.

¹⁵ Likewise, in *Aberdeen & Rockfish R. Co. v. United States*, 682 F.2d 1092 (5th Cir. 1982), also relied on by the *en banc* Court, the agency action was clearly within the ordinary authority of the agency. Insofar as its dictum tources on the issue here, the court supported *judicial* authority to construe a statute's jurisdictional language, saying: "Statutory construction normally raised only questions of law, which are freely reviewable *de novo* by the Courts."

Commission's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute" are also pertinent. (*Id.*, quoting *National Muffler Dealers Assn. v. United States*, 440 U.S. 472, 477 (1979).) *Batterton* was distinguished.

Here, as in *Rowan Companies, Inc.*, Congress itself defined the controlling term—"market dominance". What is more, Congress repealed the Commission's express authority to promulgate standards and procedures for determining market dominance in 1978, and, as will be shown below, the Commission's original market dominance regulations were very much a matter of Congressional concern when Congress enacted the Staggers Rail Act of 1980. The court of appeals nevertheless felt compelled to defer to the Commission's non-contemporaneous, inconsistent redefinition of market dominance in the 1981 proceeding. To the extent that *Batterton v. Francis* is relevant here, it supports deference to the Commission's original market dominance rules under the 4-R Act, and *not* to its later decision to include product and geographic competition.

The Fifth Circuit strayed even further from established law relating to deference to administrative action than did the District of Columbia Circuit in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968). The Court of Appeals for the District of Columbia Circuit had affirmed the holding of the Commission, feeling itself confined to determining only whether the Commission's ruling was supported by "substantial evidence." In the instant case the "arbitrary and capricious" standard was invoked.¹⁶ Thus the case was decided on even more restrictive grounds than those employed in *Volkswagenwerk*.

¹⁶See WCTL 719 F.2d at p. 777.

The Supreme Court reversed the D.C. Circuit on the basis that "the issue relates not to the sufficiency of the evidence but to the construction of a statute," saying that "the courts are the final authorities on issues of statutory construction." (390 U.S. at 272.) The Court went on to state that courts "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." (*Id.*, quoting *N.L.R.B. v. Brown*, 380 U.S. 278, 291 (1965).) See also *Bureau of Alcohol, Tobacco and Firearms v. F.L.R.A.*, ____ U.S. ____, 104 S.Ct. 439, 444, n. 8 (1983); *Public Service Commission v. FPC*, 511 F.2d 338, 354 (D.C. Cir. 1975).

The question in the instant case is, of course, one of where Congress reposed the power, but the purpose of Congress must be reasonably interpreted. It must be assumed, if the language of the statute is not clear, that Congress intended to leave the power to the courts to determine matters of policy determination or of the jurisdiction of the agency. Thus Kenneth Culp Davis states in *4 Administrative Law Treatise* 113, § 28.21:

"Completely cutting off what the courts have to offer to a governmental program may violate the cardinal principle that functions should be allocated between courts and agencies on the basis of comparative qualifications of each tribunal. The judges are specialists in constitutional issues, many aspects of statutory interpretation, in the limits of fair procedure, and in assuring that findings are supported by substantial evidence."

The *en banc* decision would have relegated to the court only the last item.

The issues here involve broad questions of Congressional intent, not narrow technical administrative detail, and courts brings unique expertise to such analyses. The court of appeals' extreme deference to the Commission deprived the public of the benefit of court review of a critical question of statutory construction and amounted to abdication of the court's responsibility.

II

THE STAGGERS ACT AND ITS LEGISLATIVE HISTORY SHOW THAT CONGRESS REJECTED A PROPOSED ALTERATION TO INCLUDE GEOGRAPHIC AND PRODUCT COMPETITION IN DETERMINING "MARKET DOMINANCE".

- A. The "market dominance" threshold for ICC jurisdiction was considered fixed and definite, changeable only by statutory amendment, when Congress embarked on amending the Interstate Commerce Act in 1980.

All congressional action on the Staggers Act and immediately preceding it indicates that the meaning of the jurisdictional concept of "market dominance" was considered by Congress to be fixed and definite when the 96th Congress began to consider the matter at the commencement of the session in 1980. This was the position of those who wanted to change the law to permit consideration of product and geographic competition (whom we shall call the "railroad side") as well as those who opposed any such change (whom we shall call the "shipper side").

This unanimity in understanding the posture of "market dominance" at the commencement of the second session of

the 96th Congress was first reflected in 1980 in a report of the Subcommittee on Oversight and Investigations of the Interstate and Foreign Commerce Committee, which had concluded that—

The Commission's decision in *Coleto Creek* [which considered product and geographic competition] represents a violation of the fundamental mandate of the 4-R Act and a dramatic departure from the ICC's own market dominance regulations and previous coal rate decisions.¹⁷

Republicans on the subcommittee, who supported the policy of freeing the ICC to adopt a broader concept of competition than that permitted in the last reasoned interpretation of the ICC (Ex Parte No. 320), nevertheless recognized that, in interpreting competition broadly enough to include product and geographic competition in the *Coleto Creek* case,¹⁸ the ICC was "playing 'fast and loose' with the law." Thus, in the minority views,¹⁹ it was

¹⁷ *Railroad Coal Rates and Public Participation: Oversight of ICC Decisionmaking*, Report by Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, House of Representatives, 96th Cong., 2nd Sess., Feb. 1980, Com. Print 96-IFC 40, p. 83.

¹⁸ *Incentive Rates on Coal-Axial, Co., to Coleto Creek, TX*, Docket No. 37226 (Jan. 15, 1980).

¹⁹ Separate views of the Honorable Norman F. Lent, ranking minority member of the Subcommittee, joined by James T. Broyhill, ranking minority member of the House Interstate and Foreign Commerce Committee, and Tom Corcoran and William E. Dannemeyer, constituting all the Republican members of the Subcommittee except Mathew J. Rinaldo, who concurred with many of the criticisms made by other members of the minority but did not sign because of his reluctance "to embrace the position of total rail deregulation."

said by these supporters of consideration of product and geographic competition:

Overall, the report shows that the ICC has embarked on a policy of "deregulation by regulation." To recognize this does not mean that I disagree with what the ICC is doing. For instance, one can support the result of the *Coleto Creek* case while recognizing that the ICC is playing "fast and loose" with the law.

In summary, the report recommends that the *actual*, expressed policies of the 4-R Act be reaffirmed and enforced on the Commission. Put another way, the ICC would not only have to follow the *spirit* of the 4-R Act, it would have to follow the letter of it as well.²⁰

When HR 7325, the administration bill, was introduced, the Department of Transportation and the administration appeared to have accepted the view that product competition and geographic competition could not be brought into play without legislative action, for the legislation as introduced would have amended the 4-R Act definition of market dominance by requiring the ICC to consider product and geographic competition.²¹

This legislation did not pass in its introduced form. It culminated in the Staggers Act which did not in any way alter the definition of the 4-R Act. All the floor action was consistent with a recognition that product and geographic

²⁰Ibid., p. 137.

²¹See HR 7325, 96th Cong. 2nd Sess., § 202(c) and particularly (e)(2)(A)(ii) and (B).

competition were not to be considered in the determination of market dominance.²²

- B. The major dispute on the bill was settled by a compromise that fully retained the 4-R Act's concept of market dominance.

The most conclusive evidence in the legislative history, showing that all parties recognized that market dominance remained unaffected,²³ was the floor action on the Staggers-Rahall amendment. That amendment struck a compromise between the "railroad side" and the "shipper side" which became the pertinent part of the enacted bill relating to the ICC's jurisdiction.

The amendment made several changes. It abandoned the immediate application of the "cost recovery percentage" as a jurisdictional threshold. It accepted the Eckhardt-Rahall proposal presuming no market dominance for rates producing revenue to variable cost ratios less than 160 percent, but only through September 30, 1981; then that percentage was to move up in the steps of five percentage points at one year intervals to October 1, 1984. After October 1, 1984, the "cost recovery percentage" was to be used as the ICC's jurisdictional threshold with the qualification that it be not more than 180 percent nor less than 170 percent of variable cost.²⁴ This structure of rising jurisdictional thresholds was accepted by proponents of

²²For fuller treatment of legislative history and a fuller account of such floor action, see R. Eckhardt, *Market Dominance in the Staggers Act*, *ICC Practitioners' Journal*, Vol. 48, No. 6, p. 662, IV. Legislative History of Staggers Act, pp. 668-697.

²³And thus was not affected by product or geographic competition.

²⁴96th Cong., 2d Sess., 126 Cong. Rec. H 8341-51 (daily ed., Sept. 5, 1980).

product and geographic competition as a *substitute* for their expanded definition of market dominance.²⁵

In the final resolution of the dispute, the House provided for consideration of product and geographic competition in only one way. Section 205 provided that the Commission should commence a proceeding for determining whether, and to what extent, geographic and product competition should be used in determining rate reasonableness.²⁶ But it expressly excluded consideration of geographic and product competition in defining the term "market dominance."²⁷

All the language supportive of geographic or product competition as an element in determining market dominance remained stricken, and in the provisions codified as § 10709 of the Interstate Commerce Act, the 4-R Act definition remained the law.

Congressman Rahall, co-sponsor and most active proponent of the amendment, described the effect of the amendment as follows:

This compromise amendment today is not undoing what the original Eckhardt-Rahall amendment accomplished...It will assure that the Interstate Commerce Commission does not proceed headlong into deregulation without

²⁵ *Market Dominance in the Staggers Act* (referred to *supra* in fn. 30) p. 676; D. *Abandonment by Railroad Side of "Actual or Potential Transportation Alternative" Test.*

²⁶ *Id.*, pp. 679-681, V. *The Act as Passed and Its Meaning* and see particularly "2" on p. 680, "Inclusion in Reasonableness Section Implies Exclusion from Threshold Section."

²⁷ § 205 of Pub. L. 96-448, set forth in Historical Note to 49 U.S.C. § 10701a.

guidelines and without a bill from the Congress...²⁸

There is nothing in the record that indicates any contradiction of this assessment or any contrary viewpoint. The bill as so amended became law largely as it was thus formulated through this compromise in the House.

C. Ex Parte No. 320 (Sub-No. 2), if allowed to stand, would permit the "railroad side" to retain all the advantages they obtained in the compromise and take away, by an administrative return to the original committee bill, all the fruits of compromise gained by the "shipper side."

From what has gone before, it is clear that upon passage of the Staggers Act a clear message was sent by Congress to the Commission that Congress was not willing to change the definition of "market dominance" to include geographic and product competition. The Conference Committee Report reaffirmed that the "definition of market dominance under existing law [had] not been altered."²⁹ and all the court of appeals judges who participated in this case agreed that the 4-R Act is controlling. Thus "effective competition" must be considered as restricted under the 4-R Act to competition by *carriers* who are competing for the traffic or movement involved.

But Judge Brown, in his dissent on the panel, and Judge Johnson, in his opinion for the *en banc* majority, rely

²⁸96th Cong., 2d Sess., 126 Cong. Rec. H. 8551 (daily ed., Sept. 9, 1980). Mr. Rahall was at the time working for the compromise with Subcommittee Chairman Florio and Chairman Staggers and was in complete accord with them.

²⁹H. Rep. No. 96-1430, 96th Cong. 2d Sess. 88-89 (1980) U.S. Code Cong. & Ad. News 1980, 4120.

heavily on succeeding language in the report, language which need not be considered as in conflict with any of the conclusions drawn here. Whatever narrow inferences may be drawn from the language of the report, the legislative history relating to what actually happened in the committees and subcommittees and on the floors of Congress is far more persuasive.³⁰

Legislative history of the Staggers Act is relevant here to show what Congress envisaged as the result of an arduous undertaking in 1980 to reconcile differences between two large and important segments of the commercial society. Important concessions were made by both sides:

1. Shippers accepted the idea that one threshold test of ICC jurisdiction would be based on revenue to variable cost percentages, with the result that rates below the specified percentages would not be subject to ICC jurisdiction over rate reasonableness.
2. Railroads relinquished insistence on a "feasible transportation alternative" test incorporating the concept of product and geographic competition as a substitute for the 4-R Act's "market dominance" test, as the other threshold for ICC jurisdiction.

After these matters were settled in hard-fought legislative encounters, the ICC would upset the reasonable

*This is particularly true when a conference is short, almost to the point of non-existence (as was the case here) and the draftsmen of the report are those who put the committee bill together and are likely to be inclined toward its form and intent before floor amendment. See R. Eckhardt, *The Western Coal Traffic League Case*, Transportation Law Journal, Vol. 13, No. 2 (1984) (in process of publication, page proof available at University of Denver School of Law). Note particularly "IV. THE CONFERENCE COMMITTEE REPORT, Weight and Credibility to Be Attributed to Report Language."

compromise that settled the major dispute between the vying sides, making the whole legislative process meaningless.

Shippers would be robbed of the fruits of their compromise. Railroads would retain their side of the bargain and would also get back what they had conceded in trade for it: agreement to retain the established 4-R Act conception of "market dominance".

CONCLUSION

Considering the importance of the issue and the fact that the meaning of "market dominance" has not been conclusively decided by any court, this Court should grant certiorari.

Respectfully submitted,

Robert C. Eckhardt
Attorney for
Russell Long
Lloyd Bentsen
Nick Joe Rahall
Tom Loeffler
Jack Brooks
J.J. Pickle
Sam B. Hall
Michael A. Andrews
Bill Patman
Alan Mollohan